

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	GN Docket No. 09-191
Preserving the Open Internet)	
)	WC Docket No. 07-52
Broadband Industry Practices)	

REPLY COMMENTS OF

**INTERNATIONAL DOCUMENTARY ASSOCIATION
FILM INDEPENDENT
UNIVERSITY FILM & VIDEO ASSOCIATION
INDEPENDENT FILMMAKER PROJECT
INDEPENDENT FEATURE PROJECT / CHICAGO
IFP MINNESOTA
NATIONAL ASSOCIATION FOR MEDIA ARTS AND CULTURE**

Submitted For:

International Documentary Association
Film Independent
University Film & Video Association
Independent Filmmaker Project
Independent Feature Project / Chicago
IFP Minnesota
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SUMMARY

The Internet must remain open if there is to be a future for independent and documentary film. In recent years, the open architecture of the Internet has revolutionized independent and documentary film: it has fostered the development of new and innovative promotion and distribution channels, provided unprecedented access to rich source material, and made self-distribution of independent and documentary film feasible for the first time ever.¹ To preserve the Internet as the preeminent platform for independent and documentary films, and the diverse, creative, and often marginalized voices they bring to light, the Commission must promulgate clear and meaningful open Internet rules. As written, however, the proposed rules contain significant flaws that will undermine this objective and erect the same barriers to entry online that afflict documentary and independent filmmakers offline.

Before Internet distribution and promotion were possible, documentary and independent filmmakers had few available channels by which to share their films with the public. A small number of theaters, a few television channels, and the independent film festival circuit presented a very limited number of distribution and consumption outlets for documentary and independent film. In recent years, these opportunities were further limited by vertical integration and consolidation between and among studios, broadcast networks, and cable channels.² The Internet has lowered or removed many of these barriers to entry, and filmmakers have been able to extend the reach and run of their films in ways never before possible.

This sea change for documentary and independent film is critical to the preservation of free speech, investigative reporting, and in-depth analysis, especially at a time when the traditional news industry is in decline and traditional media sources continue to consolidate and vertically integrate. Whether through an entertaining character-driven narrative about the human condition, or through an investigation into corporate or political malfeasance, documentary and

¹ See Manohla Dargis, *Declaration of Indies: Just Sell it Yourself*, N.Y. TIMES, Jan. 14, 2010, available at <http://www.nytimes.com/2010/01/17/movies/17dargis.htm>. (Attached as Appendix A).

² See Appendix B, a statement by Peter Broderick, president of Paradigm Consulting and leading strategist for independent filmmakers and media companies nationwide, and accompanying materials.

independent films reveal hidden truths, provide windows into our diverse experiences and cultural identities, and inspire the type of civic engagement and dialogue that is critical to democracy. If documentary and independent film is to continue to have this role, we must preserve the openness of the Internet.

We strongly support the goals that the Commission has articulated for this rulemaking and the adoption of the six proposed rules set forth in the *Notice of Proposed Rulemaking* (NPRM). We are concerned, however, that the Commission might exclude a broad and virtually undefined class of “managed services” from the open Internet rules and that it would impose an overly broad “reasonable network management” exception, both of which would undermine the very openness that it seeks to preserve and that has been so critical to the Internet’s success. Furthermore, we are concerned that the proposed transparency rule does not require Internet Service Providers (ISPs) to disclose their network management practices, and we urge the Commission to establish a discrete complaint procedure that is user-friendly, meaningful, and efficient. If these provisions are not modified, documentary and independent filmmakers will again face an uneven playing field, and in the long run, the public will have far less access to documentary and independent film. We therefore offer four recommendations to remedy these deficiencies and to strengthen and clarify the rules proposed by the Commission.

First, we urge the Commission not to exclude a broad and undefined class of “managed services” from the purview of this rulemaking. To leave this category of services undefined is a recipe for misuse and abuse, and opens the door to the virtual elimination of competition online. To begin with, it is not clear that a pressing need exists for an exclusion of any kind, because the current best-effort delivery system has worked adequately thus far. Before the Commission establishes such an exclusion, it should wait until more research has been conducted to determine if further regulation is needed. More importantly, a vague or loosely defined exclusion would enable ISPs to institute a pay-for-priority regime in which content and applications from those with deep pockets would get a pass to a fast lane, while films and other content produced with little or no money for marketing and distribution would be relegated to the slow lanes. If a class of “managed services” is to be excluded from this rulemaking, the Commission should at the very least make clear that any such class must be defined based on the function of the services (e.g. video, teleconferencing, etc.), and not on who is paying for them. Finally, the Commission

should require that managed services programs must be reviewed and monitored by the Commission on a case-by-case basis.

Second, the exception for “reasonable network management” (RNM) as written would severely undermine the six open Internet principles. The proposed exception would allow ISPs to ignore any of the rules promulgated here in order to “prevent the transfer of unlawful content; or prevent the unlawful transfer of content”³—even though no adequate technology exists that can reliably determine at the ISP level whether content is lawful. Any rule that permits ISPs to install filtering or any other technology designed to ferret out infringing content under the guise of reasonable network management would inevitably cause significant amounts of lawful content, such as fair use material, to be blocked or slowed down. Worse, such technology is vulnerable to manipulation and may allow ISPs to engage in a range of non-neutral or anticompetitive activities under the banner of “reasonable network management.” As copyright holders ourselves, we care deeply about the protection of copyrighted work—but this is the wrong way to go about it. We recommend that this exception be focused on technical efforts to promote network efficiency, and that the standard for what constitutes “reasonable” in the RNM definition turn on whether the activity is narrowly tailored to address a critically important interest.⁴

Third, the Commission’s proposed transparency rule should be made more robust by setting forth minimum standards for adequate transparency. We propose that ISPs be required to provide clear, comprehensive, and easy-to-understand disclosure of any network management activity that may interfere with a user’s service so that documentary filmmakers, independent filmmakers, and others can quickly and easily determine whether or not transmission of their films has been throttled, slowed, or blocked. Furthermore, we urge the Commission to remove the term “subject to reasonable network management” from the proposed transparency rule

³ In the Matter of Preserving the Open Internet; Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, *Notice of Proposed Rulemaking*, FCC 09-93, 24 FCC Rcd. 13064 ¶ 135 (rel. Oct. 22, 2009) (“*NPRM*”).

⁴ Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-To-Peer Applications, *Memorandum Opinion & Order*, 23 FCC Rcd. 13028 (2008) (“*Comcast Order*”). Although the *Comcast Order* has been vacated by *Comcast Corporation v. Federal Communications Commission* (--- F.3d ---, 2010 WL 1286658 (D.C. Cir. Apr. 6, 2010)), the standard adopted by the Commission within that Order should be used as a model for this rulemaking.

because that language would allow ISPs to avoid disclosing important information in a wide range of circumstances in the name of network management.

Fourth, the Commission should establish a complaint process that is user-friendly, meaningful, and efficient. We recommend that the complaint procedure be simple and accessible via the websites of both the Commission and the ISPs, and it should apply uniformly to all broadband Internet providers. If a party making a complaint can make a reasonable showing of a violation, we propose that the burden should then shift to the ISP to demonstrate that its practice qualifies as reasonable network management. Finally, we suggest that the process require the Commission to respond to complaints within a set timeframe.

We understand that the Commission is reviewing its jurisdictional authority over matters related to this rulemaking in light of the recent *Comcast Corporation v. Federal Communications Commission* decision.⁵ The Commission is the appropriate agency to ensure that the Internet remains free and open, and we submit this Reply Comment under the assumption that the Commission either already has, or will be granted, the authority to conduct this rulemaking.

⁵ See *supra* note 4 and *infra* note 40.

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I. INTRODUCTION

To preserve the future of documentary and independent film and its vital role in our democracy, the Internet must remain open. The Commission has requested comment on how its proposed rules will “promote free speech, civic participation, and democratic engagement” and preserve innovation and competition on the Internet.⁶ As organizations of documentary and independent filmmakers representing over 25,000 members around the world whose work is born of an unparalleled entrepreneurial and creative drive to give voice to the voiceless and reveal hidden truths, we uniquely appreciate how important a truly open Internet is to these goals. We submit this Reply Comment in order to express our grave concern that, as written, the proposed rules will severely undermine them.

For over a hundred years, documentary and independent film has been an essential part of American culture and politics. It is a compelling vehicle for conveying untold stories from often marginalized viewpoints, a critical educational tool, and a vital means by which to present cultural and political criticism and analysis. Over the years, documentary and independent films have galvanized and reenergized social movements,⁷ brought critical issues to the forefront of political discourse,⁸ and directly impacted countless lives.⁹ As one example among many, *The Thin Blue Line* (Third Floor Productions 1988) was introduced into evidence on appeal for a man who was wrongly convicted for murder, proving that certain witnesses had committed perjury and leading directly to the man’s release from prison.¹⁰ On a broader scale, documentary and

⁶ NPRM ¶¶ 102, 51, 52.

⁷ THE COVE (Diamond Docs 2009); AN INCONVENIENT TRUTH (Lawrence Bender Productions 2006).

⁸ For example, films like *Super Size Me* (Kathbur Pictures 2004) and *Fast Food Nation* (Recorded Picture Company 2006) revealed the health hazards of a fast food diet and ignited a conversation that eventually led to a historic ban on artificial trans fatty acids in fast food, see MSNBC.com, New York City Passes Trans Fat Ban, <http://www.msnbc.msn.com/id/16051436/>, and a law requiring chain restaurants to display calorie counts for each menu item. See Shari Roan, *Weighing California’s Restaurant Calorie-Listing Law*, L.A. TIMES, Oct. 1, 2008, http://latimesblogs.latimes.com/booster_shots/2008/10/california-rest.html. See also SOUND AND FURY (Aronson Film Associates 2000) (Academy Award-winning film that reshaped the national discussion about safety and effectiveness of cochlear implants and society’s general treatment of people with hearing disabilities).

⁹ Documentary film also has the power to shine a spotlight on issues that have lain dormant for years. For example, the film ROMAN POLANSKI: WANTED AND DESIRED (Antidote Films 2008) recently reignited controversy over the complex and infamous thirty-year old statutory rape case against the famous director, whose claims of prosecutorial misconduct are directly rooted in facts brought to light by the film. See Harriet Ryan, *Polanski Hearing Puts Focus on Documentary Filmmaker*, LOS ANGELES TIMES, Feb. 17, 2009, available at <http://articles.latimes.com/2009/feb/17/local/me-polanski17>.

¹⁰ MAXINE BAKER, DOCUMENTARY IN THE DIGITAL AGE 7 (2006).

independent films provide an astonishing diversity of voices and viewpoints that is unrivalled in today's media environment. Whether criticizing political decision-makers and the structures that support them,¹¹ challenging the conventional wisdom in academia,¹² revealing scientific wonder,¹³ celebrating cultural diversity,¹⁴ documenting struggles for freedom and equality,¹⁵ or contributing to the national conversation on the most urgent issues of the day,¹⁶ these films present a range of ideas and viewpoints with nuance and depth that profoundly impact our politics and culture. In light of the growing consolidation in traditional media combined with cutbacks at newspapers and other print media, documentary and independent film has become more important than ever before, and its role will only become more pronounced in years to come.

Although distribution of documentary and independent film through traditional media was possible in the past, it was the rare film that made it. As ownership of American media has become increasingly concentrated, it has become nearly impossible for documentary and independent films to gain prominence through traditional media alone, and the marketplace of ideas has become dominated by the most powerful and well-funded voices. The equal

¹¹ See e.g., UNPRECEDENTED: THE 2000 PRESIDENTIAL ELECTION (Los Angeles Independent Media Center 2002) (making the case that the Florida vote recount was fraudulent and that the subsequent Supreme Court decision to decide the election was unjust); AN INCONVENIENT TAX (Life is My Movie Entertainment Company 2010) (proposing that Congress uses the tax code in many ways to achieve political goals that are unrelated to raising revenue); I.O.U.S.A. (O'Malley Creadon Productions 2008) (examining the rapidly growing national debt and offering ways to mend America's spendthrift ways).

¹² See EXPELLED: NO INTELLIGENCE ALLOWED (Promise Media Corporation 2008) (illustrating mainstream science's suppression of scientists who believe they see evidence of intelligent design in nature); INDOCTRINATE U (Moving Picture Industry 2007) (revealing the pressures conservative students at American universities are under to conform to political correctness and liberal ideologies).

¹³ See, e.g., *Nova*, WGBH Boston Public Broadcasting Station, <http://www.pbs.org/wgbh/nova/>; WINGED MIGRATION (Bac Films 2002) (using in-flight cameras to present the immense distances birds routinely travel during migration); MARCH OF THE PENGUINS (Bonne Pioche 2005) (depicting the epic annual mating journey of emperor penguins across Antarctica).

¹⁴ See, e.g., *American Masters*, Public Broadcasting Service, <http://www.pbs.org/wnet/americanmasters/about-the-series/introduction/14/> (presenting biographies of American cultural icons).

¹⁵ See, e.g., EYES ON THE PRIZE (Blackside 1987), a fourteen-hour documentary film series about the African-American Civil Rights Movement; THE SINGING REVOLUTION (Northern Lights 2006) (documenting the Estonian revolution against Soviet occupation in the late 1980s).

¹⁶ E.g., while Al Gore's documentary AN INCONVENIENT TRUTH (see *supra* note 7) called attention to the problem of global warming, the film NOT EVIL, JUST WRONG (Greener Horizon Films 2009) questions environmental regulations supported by inconclusive evidence of climate change. See also THE GREAT GLOBAL WARMING SWINDLE (WAGtv 2007).

opportunity nature of the open Internet—in other words, the current policy¹⁷ and basic architecture¹⁸ that requires broadband providers to deliver all content equally and ensures that consumers, not ISPs or content providers, pick the winners and losers—has helped level the playing field and has allowed smaller media outlets such as documentary and independent films to play a greater role in the promotion of free speech and the development of an informed and engaged America. Indeed, we are on the cusp of a new golden age of independent and documentary film. Today, the Internet is home to an unprecedented selection of easily accessible film and video content, and online viewership is exploding in popularity.¹⁹ Given these developments and more broadband penetration spurred by the Commission’s National Broadband Plan,²⁰ online film distribution will outpace traditional distribution models in a matter of years.

In fact, documentary and independent filmmakers have blazed the trail for an entirely new online film distribution industry. Under the traditional model, independent filmmakers would often sell their rights to a company in a distribution deal, and if a film opened poorly, the company might abandon all exhibition and distribution efforts. With an open Internet, independent filmmakers no longer depend on distribution companies to the same degree because they can self-distribute through online channels. Newly-developed models include online DVD sales directly from the filmmaker or film company website,²¹ streams and downloads from third-

¹⁷ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Policy Statement, 20 FCC Rcd 14986, 14987–88.

¹⁸ See Ed Krol & Ellen Hoffman, *FYI on “What is the Internet?”*, IETF RFC 1462, at 3 (May 1993), <http://www.ietf.org/rfc/rfc1462.txt> (“The communicating computers—not the network itself—were also given the responsibility to ensure that the communication was accomplished. The philosophy was that every computer on the network could talk, as a peer, with any other computer.”).

¹⁹ Nearly a fifth of Internet users access Internet video websites daily, a dramatic increase from eight percent in 2006. Mary Madden, *The Audience for Online Video-Sharing Sites Shoots Up*, PEW INTERNET AND AMERICAN LIFE PROJECT, (2009), available at <http://www.pewinternet.org/Reports/2009/13--The-Audience-for-Online-Video-Sharing-Sites-Shoots-Up.aspx>. In addition, Netflix reports that, “As of the fourth quarter of 2009, nearly half of Netflix’s more than 11 million subscribers instantly watched fifteen minutes or more of streaming content.” Netflix, Inc. Jan. 14, 2010 Comments, WC Docket No. 07-52, GN Docket No. 09-191, at 2.

²⁰ See *Connecting America: The National Broadband Plan*, FEDERAL COMMUNICATIONS COMMISSION, available at <http://download.broadband.gov/plan/national-broadband-plan-chapter-1-introduction.pdf>.

²¹ See, e.g., *supra* note 1 (discussing distribution of MUTUAL APPRECIATION (Mutual Appreciation LLC 2005)); DTOUR (2008) available at <http://dtourmovie.com/store/>. Of course, thousands of DVDs are also available via online stores such as Amazon.com (<http://www.amazon.com/Documentary-DVD/b?ie=UTF8&node=508532>) and iTunes (<http://www.apple.com/itunes/charts/movies/>).

party websites,²² episodes downloadable to mobile devices,²³ and websites such as Babelgum²⁴ and The Auteurs²⁵ that host hundreds of small independent productions by relatively unknown filmmakers.

These new opportunities have enabled filmmakers to break free from the strict time tables of festivals and theatrical release to better control the reach and run of their films. For films with a highly specialized appeal, the open Internet is a powerful means to transcend geographic limitations to reach niche audiences that Hollywood traditionally underrepresents but which are heavily represented online.²⁶ For films with an especially urgent message, the open Internet has allowed almost immediate distribution. *Iraq for Sale: The War Profiteers*,²⁷ for example, was promoted and distributed online, bypassing the festival circuit and ensuring immediate delivery of its urgent political content.²⁸ In the offline world, such opportunities are unheard of, as lead time for theatrical bookings and television programming is at least three to six months.

Beyond distribution, the open Internet has become critical to promotion, fundraising, and production. For example, the producers of *The Age of Stupid*, which presents a cautionary tale about climate change, raised over one million dollars through the film's website to fund

²² See, e.g., The Auteurs, <http://www.theauteurs.com/>; Babelgum, <http://www.babelgum.com/>; SnagFilms, <http://www.snagfilms.com/>; Hulu, <http://www.hulu.com/documentaries>; Netflix, <http://www.netflix.com>; PBS Video, <http://video.pbs.org/> (all last visited Mar. 30, 2010).

²³ See Andrew O'Hehir, *Movies online: The Future is (almost) here*, Salon.com, June 17, 2009, http://www.salon.com/entertainment/movies/beyond_the_multiplex/feature/2009/06/17/digital_dist/ (providing the example of Sally Potter's film "Rage" which debuted as downloadable episodes for mobile devices through Babelgum.com at the same time it was released in theaters and on DVD).

²⁴ See Babelgum, <http://www.babelgum.com/> (last visited April 20, 2010).

²⁵ TheAuteurs has allied with Martin Scorsese's World Cinema Foundation to provide cinephiles with a carefully curated selection of hard to find films in high definition quality. <http://www.theauteurs.com/>; Sonia Zjawinski, *Streaming Hard-to-Find Films for Cinephiles*, WIRED MAGAZINE, May 22, 2009, available at http://www.wired.com/entertainment/hollywood/magazine/17-06/pl_screen.

²⁶ See Brita Wagner, *The Future of Movies on the Internet*, Movie Maker (Feb. 8, 2003), http://www.moviemaker.com/directing/article/the_future_of_movies_on_the_internet_3259/.

²⁷ (Brave New Films 2006) (documenting the involvement of companies with no-bid contracts in the Iraq war).

²⁸ Peter Broderick, *Welcome to the New World of Distribution*, Sept. 16, 2008, <http://www.peterbroderick.com/writing/writing/welcometotheword.html>, attached hereto at Appendix B. As another example, THE END OF AMERICA (Impact Partners 2008), available at <http://www.endofamericamovie.com/> (click on "connect" link to view this film through IndiePix), a film based on Naomi Wolf's best-selling book that proposes that American democracy is slipping gradually towards fascism, capitalized on the Internet's instantaneous distribution to transmit its time-sensitive critique of the previous U.S. Administration's policy changes to reach a wide audience quickly by streaming through free online outlets like IndiePix Films and Snag Films (http://www.snagfilms.com/films/title/the_end_of_america/).

production, distribution, and a social action campaign.²⁹ They also leveraged that online network to book approximately one hundred theatrical openings worldwide. Such “crowd sourcing” has been made possible by third party websites such as IndieGoGo.com, which allows filmmakers to fundraise, promote, and use other tools to produce their film and build a fan base.³⁰ *The Secret*, a documentary about self actualization,³¹ further demonstrates the potential of such online promotional tools: widely distributed viral trailers attracted viewers to the film’s website, where they could pay to watch the entire film streamed at full resolution, and when the DVD was finally released, over two million copies sold in the first twelve months.³²

The open Internet provides unprecedented opportunities for documentary and independent filmmakers to interact and engage with their audiences about the issues raised in their films. For example, SnagFilms, a popular website which hosts over 650 legally licensed videos for free, links each film to a charity that viewers can support,³³ The documentary *New Muslim Cool* harnessed the interactive power of the Internet to connect its audience to its story of a young, Puerto Rican-American hip-hop artist who converts to Islam and contends with racist and nationalistic sentiments.³⁴ The film’s producers engaged their audience through multiple online means, including: social networking websites to publicize screenings and events; serial release of clips and deleted scenes from the film to encourage users to regularly return to the *New Muslim Cool* YouTube channel; and national partnerships with like-minded organizations to show the film at events and link audience members back to the film’s website and discussion boards.³⁵ In the future, such audience engagement and two-way collaboration between

²⁹ See THE AGE OF STUPID (Spanner Films 2009), <http://www.ageofstupid.net/money> (last visited Mar. 30, 2010) (“The entire five-year *Age of Stupid* adventure has been funded by 620+ ordinary people investing and donating more than £850,000.”).

³⁰ See IndieGoGo, <http://www.indiegogo.com/> (last visited, April 20, 2010).

³¹ (Prime Time Productions 2006).

³² Peter Broderick, *Welcome to the New World of Distribution*, indie Wire (Sept. 16-17, 2008), available at <http://www.peterbroderick.com/writing/writing/welcometotheword.html>, available at Appendix B.

³³ See SnagFilms, <http://www.snagfilms.com/> (last visited April 20, 2010).

³⁴ San Francisco Film Society, NEW MUSLIM COOL (Specific Features 2009), <http://www.sffs.org/causes-and-impacts/case-studies/new-muslim-cool.aspx> (last visited April 20, 2010).

³⁵ *Id.*

filmmakers and their audiences will be enhanced by technologies that are specifically designed to connect audience members online.³⁶

The open Internet has also changed the very process of filmmaking because it provides unprecedented access to new and diverse sources of information; filmmakers can now utilize raw footage, archival materials, video clips, and news from other countries that had never before been available. To make *Burma VJ: Reporting from a Closed Country*, which tells the story of the Fall 2007 uprisings against the military regime in Burma, filmmaker Anders Østergaard used footage that citizen journalists shot on the ground, smuggled into Thailand, and distributed online through blogs and the BBC.³⁷ The open Internet will enable countless projects of this sort in the future, as filmmakers will be able to access raw footage from afar through blog posts, cell-phone videos, local news streams, and other methods that previously had been impossible to utilize.

If independent and documentary film is to have a future, the Internet must remain open and these innovative distribution channels, diverse sources of information, and groundbreaking ways of engaging audience members must remain intact. With its proposed open Internet rules, the Commission is moving in the right direction toward preservation of the open Internet. We are deeply concerned, however, that the proposed exclusion for managed services and exception for reasonable network management are so broad and open-ended that they could severely undermine the Commission's goals. If these provisions are implemented in their present form, and without firm rules requiring transparency and a complaint procedure that works for users and small distributors, they will marginalize and could eventually shut out documentary and independent film entirely.

The Commission has invited comment on its jurisdiction over broadband Internet access service and this rulemaking.³⁸ We understand that in light of the recent decision in *Comcast*

³⁶ For example, Sony is currently developing CINECHAT, which enables film audiences around the world to chat in real time about the film they are viewing. See Sony cinechat.net, available at <http://cinechat.net/langs/en/index.html> (last visited April 23, 2010).

³⁷ Charlie Bass, *Film Review: Burma VJ: Reporting From a Closed Country*, The Independent, May 28, 2009, <http://www.independent.org/2009/05/28/burma-vj/>.

³⁸ *NPRM* ¶ 87.

Corporation v. Federal Communications Commission,³⁹ the Commission is reviewing its jurisdictional authority over this rulemaking.⁴⁰ We think that the Commission is the appropriate agency to ensure that the Internet remains free and open, given the place Congress has given it in the overall regulatory scheme and the fact that Congress established the Commission in order to ensure that America enjoys a communications infrastructure that is robust, competitive, and conducive to innovation.⁴¹ We propose the following four recommendations under the assumption that the Commission either already has, or will be granted, the authority to conduct this rulemaking.

³⁹ See *supra* note 4.

⁴⁰ See *FCC Statement on Comcast v. FCC Decision*, FEDERAL COMMUNICATIONS COMMISSION (April 6, 2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297355A1.pdf (“The FCC is firmly committed to promoting an open Internet and to policies that will bring the enormous benefits of broadband to all Americans. It will rest these policies—all of which will be designed to foster innovation and investment while protecting and empowering consumers—on a solid legal foundation.”); Amy Schatz, *Court Backs Comcast Over FCC on ‘Net Neutrality’*, WALL ST. J., April. 7, 2010, available at http://online.wsj.com/article/SB10001424052702303411604575167782845712768.html?mod=WSJ_hp_mostpop_read.

⁴¹ See 47 U.S.C. §§ 151 (providing that goals of the Commission are, among other things, “to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges”), 157 (“It shall be the policy of the United States to encourage the provision of new technologies and services to the public.”), 257 (mandating that the Commission conduct an ongoing review to identify and eliminate “market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services,” with the goal of promoting “the policies and purposes of this [Communications] Act favoring a diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity”); see also American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(1-2) (2009) (“Not later than 1 year after the . . . enactment of this section, the Commission shall submit [to Congress] a report containing a national broadband plan.” The Act proceeds to specify what the Commission shall include in the broadband plan.).

II. RECOMMENDATIONS

1. **“Managed Services” Should Not Be Excluded From This Rulemaking Without Further Fact-Finding; Such a Rule Could Open the Door to an Unfair Pay-for-Priority System That Could Force Out Many Marginalized and Independent Voices**

Overview

The Commission should not exclude a separate category of managed services from this rulemaking until it gathers more information on the nature and impact of these services. We are concerned that a carelessly promulgated exclusion would do nothing to prevent ISPs from developing unfair pay-for-priority systems in which those who can pay more are placed into a fast lane and everyone else is relegated to a slow lane.⁴² A tiered system such as this would severely undermine the nondiscrimination⁴³ and consumer choice⁴⁴ principles with potentially devastating effects for entrepreneurs, start-ups, and documentary and independent filmmakers. The potential problems would not stop there: if the Commission does not appropriately define and oversee managed services, it will create a massive loophole in which ISPs can avoid any open Internet rules simply by classifying certain content or applications as “managed services.” In short, an exclusion for managed services without proper protections in place is a recipe for misuse and abuse, and it opens the door to the virtual elimination of competition online.

Analysis

Documentary and independent filmmakers are concerned that if the Commission excludes “managed services” from its proposed rules without further definition and ongoing oversight,⁴⁵ nothing will stop ISPs from setting up a pay-for-priority regime,⁴⁶ the very anticompetitive system the Commission seeks to prohibit through its proposed nondiscrimination

⁴² See Jonathan Krim, *Executive Wants to Charge for Web Speed*, THE WASHINGTON POST, Dec. 1, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/30/AR2005113002109.html>.

⁴³ NPRM ¶ 106 (“We understand the term ‘nondiscriminatory’ to mean that a broadband Internet access service provider may not charge a content, application or service provider for enhanced or prioritized access to the subscribers of the broadband Internet access service provider . . .”).

⁴⁴ *Id.* at ¶ 92 (“Subject to reasonable network management, a provider of broadband Internet access service may not prevent any of its users from sending or receiving the lawful content of the user’s choice over the Internet.”).

⁴⁵ *Id.* at ¶ 151 (seeking comment on how to define these services).

⁴⁶ See Jonathan Krim, *Executive Wants to Charge for Web Speed*, THE WASHINGTON POST, Dec. 1, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/30/AR2005113002109.html>.

principle.⁴⁷ Both the Commission and many commenters—including many ISPs—fully expect that “managed services” will be delivered using the same broadband bandwidth as Internet access traffic.⁴⁸ As a result, “managed services” that favor some applications or content can be expected to slow down other, disfavored applications or content. Thus a two-tiered system would arise: those with the ability to pay would get access to an ISP’s broadband fast lane, while those without large budgets for distribution and marketing, such as start-ups and documentary and independent filmmakers, would be pushed into a slow lane. Consumers can be expected to gravitate toward “fast lane” content, leaving less well-capitalized entrepreneurs and small businesses at a competitive disadvantage. Such a result would undermine the Commission’s first open Internet principle because it would be more difficult for users to send and receive the lawful content of their choice;⁴⁹ and it would thwart the Commission’s goal of preserving the Internet as a hotbed for innovation and competition.⁵⁰ Skype, eBay, YouTube, and Yahoo are just a few of the thousands of life-changing offerings developed by new entrants that might not have been developed had such a regime been in place all along.

A pay-for-priority regime could devastate the documentary and independent filmmaking industry because many small, independent filmmakers and documentarians would not be able to afford to pay a premium to ISPs. The open Internet has given life to countless films that were not feasible for distribution over traditional media. If the Commission were to permit an open-ended managed service exclusion, many such films would be shut out. Films that take time to gather steam, films with niche audiences or widely dispersed viewership, controversial films, films made by non-profit organizations—any film without the budget or connections to receive specialized treatment would be at risk.

Worse, if the Commission does not appropriately define and oversee managed services, it could create a loophole in which ISPs could circumvent the open Internet rules simply by

⁴⁷ See *supra* note 43.

⁴⁸ See *Id.* at ¶ 108 (“managed or specialized services, to which the principles do not apply in part or full, may be offered over the same facilities as those used to provide broadband Internet access service”); see e.g., Time Warner Cable Inc. Jan. 14, 2010 Comments, WC Docket No. 07-52, GN Docket No. 09-191, at 103 (concluding that “such managed services often are provisioned using the same network infrastructure that supports broadband Internet access . . .”); Comcast Corp. Jan. 14, 2010 Comments, WC Docket No. 07-52, GN Docket No. 09-191, at 61 (acknowledging that managed services would likely be delivered over the same physical facilities as broadband Internet access service).

⁴⁹ *NPRM* ¶ 92.

⁵⁰ *Id.* at ¶¶ 51, 52.

labeling certain content or applications as “managed services.” Documentary and independent filmmakers are particularly concerned about such a loophole in light of vertical integration deals such as the Comcast-NBC Universal merger announced in 2009:⁵¹ even where filmmakers could pay for prioritized service, they would potentially still be subject to gatekeeping and/or discrimination as ISPs favor their own or affiliated content or applications. For example, if an ISP were to provide streaming video content as a managed service, it could deprioritize the feeds of unaffiliated video providers such as documentary and independent films so as to make its own offerings more attractive to consumers. Such discrimination would, of course, severely undermine many of the goals of this rulemaking.⁵²

Ultimately, a managed services regime that permits pay-for-priority and other types of discrimination would undermine the Commission’s goal of preserving the Internet as a forum for true diversity of speech and democratic participation because the accessibility of one’s content would depend on the size of one’s pocketbook.⁵³ The Internet has revolutionized the production and distribution of independent and documentary film and given rise to a spectrum of vital and creative speech the likes of which the world has never known. The Commission should champion this unprecedented information flow and promote the civic engagement and public discourse it catalyzes. It should not give ISPs the tools to segregate, privilege, or repress such speech.⁵⁴

Recommendations

In light of these problems with the Commission’s proposed approach to managed services, we strongly urge the Commission not to exclude “managed services” from the definition of broadband Internet access without first conducting additional fact-finding in a separate rulemaking.

⁵¹ See Deborah Yao and Ryan Nakashima, *Comcast-NBC deal shows future is in content: Comcast tries to future-proof with control of NBC Universal Movies and TV Programming*, ABC NEWS, Dec. 3, 2009, available at <http://abcnews.go.com/Technology/wireStory?id=9234950>.

⁵² See NPRM ¶¶ 102, 51, 52.

⁵³ See *Id.* at ¶ 53.

⁵⁴ In the long term, a managed services exclusion that is not designed to preserve the open Internet could also undermine the Commission’s goal of increasing broadband deployment (See NPRM ¶¶ 61, 153) because a “pay for priority” scheme could incentivize ISPs to increase scarcity in order to make managed services more attractive, rather than to increase investment in network infrastructure.

Before moving forward, the Commission should first determine whether the type of offerings that are candidates for “managed services” classification cannot be effectively delivered over the open Internet and that it would be beneficial to partition the existing broadband pipes. The current best-effort system of delivery has worked to deliver bandwidth-intensive content, such as high-definition digital video content from Netflix and Voice Over Internet Protocol (VoIP) service from Skype.⁵⁵ The Commission itself acknowledges that although there has been rapid growth of broadband applications and content that require reliable delivery with low latency ISPs have usually been able to support such applications sufficiently by providing additional bandwidth or using sophisticated software techniques.⁵⁶ As producers of bandwidth-intensive media, we, like all content providers, seek reliable, high-quality ways to deliver our films; but it is not yet clear that a “managed services” exclusion would help to achieve that goal. Until the Commission has determined that a compelling need exists to provide special treatment for certain services, it should not establish a “managed services” exclusion.

In addition, before moving forward the Commission should determine how to define “managed services”—and how managed services can be implemented in a way that ensures that marginalized and independent uses are not degraded and that the open Internet principles are not undermined.

If the Commission does open a new proceeding, we propose that managed services be defined based on their function (*e.g.*, video, teleconferencing, etc.), and not based on ability to pay. Access to “managed services” bandwidth must be permitted on equal terms to all comers who wish to offer the same type of service. Such a provision would reduce the likelihood for discrimination based on content or ability to pay. Finally, we recommend that under any exclusion, ISPs be required to submit proposed “managed services” to the Commission for approval on a case-by-case basis. The process should require the ISPs to disclose how the service functions, how much capacity will be allocated to it, any resulting impacts the service

⁵⁵ See *NPRM* ¶ 57 (“For example, Skype has more than 440 million registered users for its Internet-based real-time communications application, which runs over the best-effort Internet.”) citing Skype Communications, S.A.R.L. July 21, 2009 Reply, GN Docket No. 09-51, at 1 n.1; *see also* Netflix, Inc. Jan. 14, 2010 Comments, WC Docket No. 07-52, GN Docket No. 09-191, at 2 (“As of the 4th quarter of 2009, nearly half of Netflix’s more than 11 million subscribers instantly watched 15 minutes or more of streaming content.”).

⁵⁶ *NPRM* ¶ 57.

will have on Internet traffic over the ISP's network, and the service's effect on the open Internet rules promulgated in this rulemaking.

2. Reasonable Network Management Should be Focused on Technical Efforts to Make the Network Run Properly

Overview

The Commission has proposed an exception to the Open Internet rules for “reasonable network management,” and has proposed that the exception would cover activity intended to mitigate network congestion, address unwanted traffic, prevent the transfer of unlawful content and the unlawful transfer of lawful content, as well as other practices.⁵⁷ We firmly support an exception that encompasses the traditional, technical meaning of this term: to permit an ISP to ensure that its network is functioning properly by performing operational and planning activities such as maintenance, administration, configuration, and design.⁵⁸ We do not, however, support the proposed new, non-technical components of the exception: to “prevent the transfer of unlawful content; or prevent the unlawful transfer of content.”⁵⁹ As producers of bandwidth-intensive video content and as copyright holders ourselves, we certainly support efforts to protect copyright and reduce congestion—but to judge the lawfulness of content moving over the network and then to take action against that content is an entirely different practice from ensuring that the network operates smoothly. No technology exists that would enable ISPs to accurately assess the lawfulness of content traveling over their networks, and ISPs are ill-suited to make such complex assessments. We are deeply concerned that under the proposed definition of “reasonable network management,” less well-funded content providers such as documentary and independent filmmakers would find their offerings wrongfully slowed or stopped due to errors in enforcement. Worse, because the language of the proposed exception is so vague, documentary and independent filmmakers could be subject to censorship or anticompetitive gatekeeping, as ISPs could ignore any open Internet principle simply by characterizing their behavior as reasonable network management. In addition to these problems, the proposed

⁵⁷ *Id.* at 135.

⁵⁸ *See infra* note 60.

⁵⁹ *NPRM* ¶ 135.

definition raises grave privacy concerns because it could be interpreted to allow ISPs to intercept and examine content.

Analysis

For decades, the term “network management” has referred to technical management practices aimed at ensuring the efficient operation of the network,⁶⁰ and use of the term “reasonable network management” in this rulemaking should be restricted to this well-established understanding. We object to the Commission’s proposed definition of reasonable network management because it diverges sharply from this traditional meaning to include determinations about the lawfulness of content moving across the network. We are alarmed that the exception would have the unintended effect of blocking or slowing significant amounts of lawful content in ways that disproportionately affect documentary and independent filmmakers, entrepreneurs, users, and anyone not in a position to work closely with ISPs.

There is no technology sophisticated enough to determine accurately what is and is not lawful content. For example, to the extent that copyright enforcement efforts rely on copyright filtering technology, such filters are bound to be overinclusive: lots of lawful material would be stopped or throttled, and in some iterations entire applications or classes of users would be throttled).⁶¹ Those that advocate the use of copyright filtering do so presumably because they

⁶⁰ See R.D. Jennings, R.F. Linfield & M.D. Meister, Inst. for Telecomm. Sciences, Nat’l Telecomm. and Info. Admin., U.S. Dep’t of Commerce, *Network Management: A Review of Emerging Concepts Standards, and Products* 20(1993); *Engineering and Operations in the Bell System*, Bell Telephone Laboratories, Inc. 493, (1977) (describing network management as the practices “that keep[] the network operating near maximum efficiency when unusual traffic patterns or equipment failures would otherwise force the network into a congested inefficient condition”). The International Organization for Standardization (ISO) model, which has been a benchmark for computer networking since 1978, breaks down network management into five areas, none of which anticipate determinations of lawfulness or other copyright enforcement practices: fault (detecting and repairing technical flaws in the network); accounting (managing the charges and expenses of running the network); configuration (updating the network according to configuration changes in software and hardware); performance (maintaining acceptable levels of response time, link usage, and other network performance); and security management (protecting the network against viruses and hackers). International Standard ISO/IEC 7498-4, Part 4: Management Framework, Joint Technical Committee ISO/IEC JTC 1, INT’L ORG. FOR STANDARDIZATION/INT’L ELECTROTECHNICAL COMM’N (1989), available at [http://standards.iso.org/ittf/PubliclyAvailableStandards/s014258_ISO_IEC_7498-4_1989\(E\).zip](http://standards.iso.org/ittf/PubliclyAvailableStandards/s014258_ISO_IEC_7498-4_1989(E).zip). See also Mark Miller, *Internet Technologies Handbook*, 627-30, John Wiley & Sons, Inc. (2004).

⁶¹ See Tim Wu, *Has AT&T Lost Its Mind?*, Slate, Jan. 16, 2008, available at <http://www.slate.com/id/2182152/> (“Exactly what counts as copyright infringement can be a tough question for a Supreme Court justice, let alone whatever program AT&T writes to detect copyright infringement. Inevitably, AT&T will block legitimate materials (say, home videos it mistakes for Hollywood) and let some piracy through.”) Of course, automated copyright filters are likely not only to be overinclusive, but underinclusive (i.e., lots of unlawful material would get through as well).

anticipate that they have the resources and market power to ensure that ISPs do not wrongfully block their content. Less powerful rightsholders, however, may lack these resources, and documentary and independent filmmakers legitimately fear that if copyright filtering or other technology is permitted without being subject to the Open Internet rules, they will see their work wrongfully slowed or blocked in disproportionate numbers.

More fundamentally, ISPs lack the expertise and authority to determine what content is lawful and what is not. The Commission's proposed exception for reasonable network management would turn ISPs into copyright judges, and circumvent the procedure Congress established in the Digital Millennium Copyright Act to handle copyright infringement online. The DMCA was the result of years of fact-finding and Congressional hearings, and it rightfully vests federal courts with the ultimate decision-making authority after a carefully crafted notice and takedown procedure. The procedure is far from perfect, but unlike the Commission's proposed reasonable network management exception, it attempts to balance the interest of rightsholders in copyright enforcement with the interests of users, who wish to lawfully utilize the Internet, and the interests of ISPs, who need a safe harbor to function without fear of liability.⁶² The DMCA's notice and takedown procedure reflects this balance and contains numerous procedural safeguards.⁶³ In contrast, the proposed reasonable network management exception contains no procedural safeguards. Under the proposed exception it is the ISP—not the complainant—who would decide whether to slow or entirely block content; there is no procedure that would notify the alleged infringer that his or her content is being slowed or blocked; and there is no procedure that would allow a party to dispute the wrongfulness of such acts.

The lack of procedural safeguards in the proposed reasonable network management exception is particularly disturbing in light of this country's experience with the DMCA. The

⁶² See S. Rep. No. 105-190, at 9 (1998) ("The current legislation contains . . . important procedural safeguards for individual Internet users to ensure that they will not be mistakenly denied access to the World Wide Web . . ."); *Id.* at 19-20 (stating that the DMCA aims to provide greater certainty to ISPs regarding their exposure to liability through the course of their activities).

⁶³ Digital Millennium Copyright Act, *codified at* 17 U.S.C. §§ 512(c)(3) (1998) (setting forth requirements for written notification to service provider), (f) (providing liability for misrepresentation about removal of material), (g) (providing for notification to subscribers, counter-notification procedure, and replacement of removed or disabled material), (m) (protection of privacy).

examples of wrongly-identified infringing content in the DMCA context are legion,⁶⁴ and should provide a cautionary picture of the consequences that would result under the Commission's proposal:

- Earlier this year, Google, Inc. wrongfully took down a rash of music journalism weblogs, even though many had explicit permission from the artists or their labels to post their songs. In one case, a band apparently received a takedown notice for its own songs posted on its own blog.⁶⁵
- In at least two cases, federal courts have found in litigation brought by content owners against online video hosting services that even content owners have great difficulty determining which works are authorized and which they consider infringing.⁶⁶
- False positives can also be the result of a takedown notice that does not consider the doctrine of fair use. In *Lenz v. Universal Music Corporation*, Universal sent a takedown notice targeting a half-minute home video clip of a toddler dancing to twenty seconds of a Prince song that is audible in the background.⁶⁷ The court

⁶⁴ In addition to the erroneously identified content, thousands of faulty DMCA take down notices have been sent. See e.g., Jennifer M. Urban & Laura Quilter, *Efficient Process of "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 Santa Clara Computer & High Tech. L.J. 621, 667 (2006). This study found that over half (57%) of notices sent to Google for removal of material were sent by businesses targeting competitors and over one third (37%) of notices were not valid copyright claims. See *id.*, *Summary Report*, 2 http://mylaw.usc.edu/documents/512Rep-ExecSum_out.pdf. Abuses such as these would likely be replicated under the proposed reasonable network management exception.

⁶⁵ See Sean Michaels, *Google Shuts Down Music Blogs Without Warning*, GUARDIAN.CO.UK, April 4, 2010, <http://www.guardian.co.uk/music/2010/feb/11/google-deletes-music-blogs>.

⁶⁶ See *IO Group Inc. v. Veoh Networks Inc.*, 586 F. Supp. 2d 1132, 1153 (N.D. Cal. 2008) ("The record suggests that, upon review of the files, Io itself was not able to readily identify which of the works allegedly work infringed."); *UMG Recordings Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099, 1104 (2009) ("Throughout discovery, UMG revised its list of allegedly infringing videos, sometimes adding and sometimes removing files."); See also Defendant's Motion for Summary Judgment, *Viacom Int'l Inc. v. YouTube, Inc.*, (S.D.N.Y. 2010) (No. 07-CV-2103), available at http://static.googleusercontent.com/external_content/untrusted_dlcp/www.google.com/en/us/press/pdf/20100318_google_viacom_youtube_memorandum.pdf 15, 38-39 (alleging that many clips plaintiff identified in the lawsuit were uploaded by plaintiff itself and some were made to appear to be unauthorized uploads, and that the plaintiff could not accurately distinguish authorized content from unauthorized content).

⁶⁷ *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

ruled that the moving party must make a good faith consideration of whether a particular use is fair use before sending its notice.⁶⁸

- In copyright infringement lawsuits against alleged music file sharers, the Recording Industry Association of America (RIAA) has misidentified alleged file sharers and seen some suits dismissed as a result.⁶⁹

If we have learned anything from our experience with the DMCA, it is that even when there is a procedure in which individual notices are sent and additional safeguards exist, false positives abound, with serious consequences for content providers and users alike.⁷⁰ An automated process that lacks procedural protections and is exempt from the proposed open Internet rules would lead to far worse consequences.

Documentary filmmakers are particularly concerned about the Commission's proposed reasonable network management exception in light of the fact that filters and other enforcement technologies do not account for fair use. Documentary filmmakers rely on fair use to criticize or analyze copyrighted material, and to make commentary generally; without fair use, documentary filmmakers could not convey their messages fully or accurately, and documentary filmmaking as we know it would not exist.⁷¹ To determine what constitutes fair use is a complex, fact-intensive analysis in which a federal court must consider four or more factors,⁷² none of which is dispositive. Under the Commission's proposed exception, however, an ISP would have carte blanche to assume the role of a federal judge and make determinations regarding lawfulness on

⁶⁸ *Id.* at 1154.

⁶⁹ See, e.g., Heather Green, *Does She Look Like A Pirate? Inside Tanya Andersen's Private War With the Recording Industry: Hint: She's Winning*, BUS. WK., April 24, 2008, available at http://www.businessweek.com/magazine/content/08_18/b4082042959954.htm.

⁷⁰ A recent incident is instructive: earlier this month, Constantin Films used YouTube's automated Content ID system to remove dozens of videos parodying a scene from the 2004 film *Downfall* even though the videos were arguably fair use. See Laura Sydell, *YouTube Pulls Hitler "Downfall" Parodies*, Apr. 23, 2010, <http://www.npr.org/templates/story/story.php?storyId=126225405>. This incident illustrates that even in the DMCA context, automated processes can cause large amounts of noninfringing content to be wrongfully removed from the Internet.

⁷¹ Ass'n of Indep. Video & Filmmakers et al., *Documentary Filmmakers' Statement of Best Practices in Fair Use*, (2005), available at http://www.centerforsocialmedia.org/files/pdf/fair_use_final.pdf.

⁷² The four factors are: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107.

the fly via automated means—a process that would be fraught with error.⁷³ As a result, many filmmakers that would otherwise have relied on fair use would be deterred from doing so; documentary and independent filmmakers would lose one of their most important tools of filmmaking; and the public would lose out on an untold amount of criticism, commentary, reporting, and scholarship.

Moreover, we have similar concerns that filters and other enforcement technologies will not acknowledge licensed content used by documentary and independent films. Instead, as with films that make fair use, films that incorporate licensed content will inevitably be wrongly slowed or stopped in light of the fact that filters and other enforcement technologies do not necessarily account for copyright licensing.

We are further concerned that, because the definition of “reasonable network management” is so open-ended and technological enforcement mechanisms are so unreliable, the proposed exception would permit ISPs to engage in a host of non-neutral and anticompetitive activities. An ISP could intentionally block competitors’ applications or disfavor a type of traffic or content that it does not like under the guise of reasonable network management, and such activity *would by definition be exempt from any consideration of the open Internet rules*. Over the long term, ISPs could control which applications would be developed based on factors they deem least threatening to their business model, rather than popularity, efficiency, or usefulness.⁷⁴

Finally, the power of ISPs to inspect the content users are sending and receiving over the network in the name of reasonable network management raises grave privacy concerns. Many commentators have argued that ISPs cannot be given free reign to use deep packet inspection (DPI) because to do so would violate consumers’ privacy rights.⁷⁵ While the Commission seeks

⁷³ See Tim Wu, *Has AT&T Lost Its Mind?*, *supra* note 61.

⁷⁴ See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 957 (2005) (Breyer, J., concurring) (arguing that “copyright laws are not intended to discourage or to control the emergence of new technologies, including (perhaps especially) those that help disseminate information and ideas more broadly or more efficiently,” citing *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417 (1984)).

⁷⁵ See *The Rise and Fall of Invasive ISP Surveillance* at 13; Danny O’Brien, *Deep Packet Inspection and the Human Element*, COLLECTION OF ESSAYS, OFFICE OF THE PRIVACY COMMISSIONER OF CANADA, <http://dpi.priv.gc.ca/index.php/essays/deep-packet-inspection-and-the-human-element/>; and Richard Clayton, *Objecting to Phorm*, COLLECTION OF ESSAYS, OFFICE OF THE PRIVACY COMMISSIONER OF CANADA, <http://dpi.priv.gc.ca/index.php/essays/objecting-to-phorm/>.

to preserve consumer privacy elsewhere in this rulemaking,⁷⁶ it has not included any safeguards in the reasonable network management exception that would prevent ISPs from using DPI to collect and store information about users. Documentary and independent filmmakers are acutely sensitive to any technology that would permit surveillance, data control, or censorship, because our films often deal with controversial subjects, reveal uncomfortable truths, and give voice to the marginalized. For a film such as *Burma VJ: Reporting From a Closed Country*,⁷⁷ which used footage that was transferred via the Internet, DPI could have allowed an ISP to degrade or block controversial footage,⁷⁸ thereby preventing the production of a timely film that helped reveal atrocities committed under a totalitarian regime.⁷⁹

Recommendations

In light of the many problems we have identified with technology-based determinations as to the lawfulness of content, the possibility that ISPs could use the proposed exception to engage in anticompetitive behavior, and serious privacy concerns, we offer the following recommendations.

First, reasonable network management should be focused on technical efforts to make the network operate efficiently, as it has always been. As copyright holders ourselves, we are concerned about copyright infringement and agree that it is important to protect against unlawful content and the unlawful transfer of content. However, it is not feasible to achieve this goal through an open-ended exception that would allow a wide range of activities without any regard for the open Internet rules. Thus, the Commission should delete sections (a)(iii), “prevent the

⁷⁶ See NPRM ¶ 53 (citing *Consumer Information and Disclosure; Truth-in-Billing and Billing Format; IP-Enabled Services*, CG Docket No. 09-158, CC Docket No. 98-170, WC Docket No. 04-36, Notice of Inquiry, 24 FCC Rcd 11380 (2009)).

⁷⁷ (Kamoli Films 2008).

⁷⁸ Christopher Rhoads & Loretta Chao, *Iran’s Web Spying Aided By Western Technology*, WALL ST. J., June 22, 2009, available at http://online.wsj.com/article/SB10001424052702303411604575167782845712768.html?mod=WSJ_hp_mostpop_re ad. (reporting that Iran appears to be engaged in deep packet inspection to block material considered offensive by the regime).

⁷⁹ We also urge the Commission to consider that deep packet inspection and other technologies under consideration are likely to slow the network down, not speed it up. An ISP that has undertaken to determine the lawfulness of content travelling across the network must examine a significant portion of all traffic in order to attempt to determine whether the content infringes any copyrights. Because such filtering takes time, it would cause traffic to be drastically slowed and contravene traditional network management practices aimed at reducing congestion.

transfer of unlawful content,” and (a)(iv), “prevent the unlawful transfer of content”⁸⁰ from the definition of reasonable network management. Part (b) of the definition, which allows an exception for “other reasonable network management practices,”⁸¹ should also be deleted because it is unnecessarily vague.

Second, network management practices that do not comply with the six rules should meet a standard more strict than the broad reasonableness standard suggested in the NPRM, to ensure that ISPs are using the RNM exception for purposes specifically tied to network maintenance and trouble-shooting, and not as a means to circumvent the Commission’s rules and engage in anticompetitive behavior. Thus, if a network management practice is to be considered “reasonable,” it “should further a critically important interest and be narrowly or carefully tailored to serve that interest.”⁸² Under this standard, any network management practice that would have a negative impact not directly related to the Commission’s goals to reduce congestion and improve network efficiency—such as the disproportionate blockage of lawful content that relies on the doctrine of fair use—would not be considered reasonable.

Finally, if the Commission decides to include (a)(iii), “prevent the transfer of unlawful content,” and (a)(iv), “prevent the unlawful transfer of content” in this exception, it should set forth procedures for Commission oversight and review of all technologies proposed for this purpose. Furthermore, the Commission should maintain regulatory oversight while such technologies are in use, and should reserve the right to impose penalties and issue injunctions where such technologies prove ineffective or are abused.

⁸⁰ *NPRM* ¶ 135.

⁸¹ *Id.*

⁸² *Comcast Network Management Practices Order*, 23 FCC Rcd at 13055–56, para. 47. Although the Comcast Order has been vacated, *see Comcast Corp v. FCC*, *supra* note 4, the standard adopted by the Commission within that Order should serve as a model for what constitutes reasonable network management by ISPs.

3. Transparency Must Be Sufficient to Allow Filmmakers and Others to Know When Their Content Is Being Blocked or Throttled

Overview

We agree with the Commission’s proposal to promulgate a transparency rule that would “protect and empower consumers” and ensure that “all interested parties have access to necessary information about the traffic management practices of networks.”⁸³ The Commission’s proposed rule, however, gives too much discretion to ISPs to determine the level of network management information that must be disclosed. Currently, the disclosure most ISPs provide is dense, vague, convoluted, or otherwise unhelpful language contained in the terms of service, and users do not understand how ISPs are managing and regulating the network. The proposed rule must be amended to require ISPs to disclose their network management practices in plain language that is easy for users to understand.

Analysis

Transparency is particularly important to documentary and independent filmmakers in light of recent consolidation of ISPs and content providers and the incentive this gives ISPs to engage in anticompetitive gatekeeping.⁸⁴ The Commission must ensure a standard of transparency sufficient to guarantee that content providers such as documentary and independent filmmakers know whether their films are being wrongfully throttled, blocked, or compromised by an ISP’s reasonable network management efforts. In addition, content providers, like Internet application designers, need to know whether their works and accompanying distribution technology are compatible with the technology used to run the network. ISPs should therefore be required to disclose information about the network management tools they are using.

Recommendations

We propose that the Commission revise its transparency rule to require ISPs to disclose any network management activity that may interfere with a user’s service—whether by

⁸³ NPRM ¶ 118.

⁸⁴ See Mark Cooper and Corie Wright, *Why the Comcast/NBC Merger Poses a Major Threat to Video Competition that Antitrust Authorities Cannot Ignore* (2009), Consumer Fed’n of Am. and Free Press.

monitoring, blocking, or throttling—in easy-to-understand language. We also urge the Commission to require more detailed disclosure of technical details about network management practices that may interfere with ordinary usage. Beyond the prominent disclosure of network management practices, users, content providers, and the Commission should be notified of any changes to the ISP’s network management practices that would involve monitoring, blocking, or throttling before such changes can be implemented.

The Commission should also revise the transparency rule so that it is no longer “subject to reasonable network management.” Such an exception would swallow the rule, and allow ISPs to disclose next to nothing in the name of reasonable network management. While we agree with commenters who point out that ISPs should not be required to disclose details that would enable hackers to circumvent security measures,⁸⁵ ISPs can in fact disclose the general type of network management technology being used, how it works, and how it will affect network traffic, without compromising security.⁸⁶

4. The Commission Must Institute a New Complaint Procedure That Is User-Friendly, Meaningful, and Efficient

Overview

As we discuss above, we are deeply concerned that under the reasonable network management exception documentary and independent films may be wrongfully throttled, blocked, or marginalized. While we agree with the Commission that “sunlight is the best disinfectant”⁸⁷ and the proposed transparency rule is part of the solution, it is critical that documentary and independent filmmakers, as well as other network subscribers, also have recourse in the form of an effective complaint procedure. The last thing this rulemaking should do is leave a low-budget filmmaker or distributor with no recourse when his or her film has been wrongfully blocked.

⁸⁵ See The Motion Picture Association of America, Inc. Jan. 14, 2010 Comments, WC Docket No. 07-52, GN Docket No. 09-191, at 22.

⁸⁶ See Paul Ohm, *The Myth of the Superuser: Fear, Risk, and Harm Online*, 41 U.C. DAVIS L. REV. 1327 (2008), available at <http://ssrn.com/abstract=967372>.

⁸⁷ *NPRM* ¶ 118.

The Commission seeks comment on whether it should adopt procedural rules specifically governing complaints involving alleged violations of any of the open Internet principles, and whether it should rely on any existing procedures as models for these rules.⁸⁸ The existing complaint procedures are either too burdensome or too inconsequential to be effective, as users may be deterred either by the complexity of the formal filing procedure or the ineffectiveness of the informal procedure. For these reasons, we urge the Commission to implement a discrete complaint procedure that is user-friendly, meaningful, and efficient in order to provide a robust enforcement mechanism for the Open Internet rules.

Analysis

The existing formal complaint system⁸⁹ is too burdensome to act as an effective safeguard for the Open Internet rules. This procedure requires a laborious set of court-like procedures merely to file a complaint. Documentary and independent filmmakers, like most users, lack easy access to legal counsel, and thus would have a difficult time deciphering and utilizing these rules in order to inform the Commission that content is being wrongly blocked.

Similarly, a complaint procedure modeled after the existing informal common carrier complaint procedure would be inadequate because the common carrier complaint procedure does not provide a mechanism for the Commission to resolve disputes.⁹⁰ Furthermore, the burden for filing an informal complaint is merely “tending to show,” which means that an inadequately large swath of ISP activity could spawn complaints and threaten to overwhelm the complaint procedure.⁹¹

Recommendations

Because existing complaint procedures are either too burdensome or inadequate, we recommend that the Commission develop a separate procedure for the Open Internet rulemaking along the following lines.

⁸⁸ *Id.* at ¶ 176.

⁸⁹ 47 C.F.R. § 1.720.

⁹⁰ 47 C.F.R. §§ 1.711-1.719.

⁹¹ 47 C.F.R. § 1.719(b) (“The complaint . . . shall be . . . a complete statement of the facts tending to show that such carrier engaged in in unauthorized change of the subscriber’s preferred carrier. . .”).

First, the complaint procedure must be simple and accessible to users. Documentary and independent filmmakers, like most Internet users, lack the resources and expertise often needed to interpret complex legal procedures; the complaint procedure must be such that the average user or independent content provider can easily navigate through the system without the aid of a lawyer in instances in which his or her content is being wrongly blocked. For further simplification, the enforcement procedure should apply uniformly to all broadband Internet providers in order to avoid undue confusion for consumers.⁹² To ensure the accessibility of the complaint procedure, its requirements should be posted as an electronic filing form on the websites of the Commission and ISPs. Also, an ISP should be required to inform its customers of the complaint procedure each time it makes a change to its network management practices, and links to the complaint procedure should be required to be prominently displayed on the ISP's homepage, on billing documents, and wherever else the ISP regularly interacts with its customers.

Second, the complaint procedure must lead to tangible relief for those who have been harmed. We recommend that users be given the ability to file complaints directly with the Commission, and upon such a filing the ISP should bear the burden of demonstrating that its practice qualifies as reasonable network management. However, the complainant should have to meet a reasonable burden so as to prevent complaints of little merit from inundating the Commission and/or ISPs.

Third, the procedure must be expeditious; the Commission should have to respond to complaints within a set timeframe. While timing is important in many disputes involving the throttling or removal of content, some films—such as political documentaries—face particularly urgent time constraints.⁹³ Even the DMCA's counter-notification procedure does not always meet users' needs, as ISPs often do not address complaints quickly enough to remedy the wrongful takedown of a time-sensitive work. Documentary and independent filmmakers are especially vulnerable to this potential weakness in the system because many of them do not have

⁹² *NPRM* ¶ 176 (questioning whether the procedural rules should “differ depending on characteristics of the defendant (*e.g.*, common carrier, cable provider)”).

⁹³ *See, e.g.*, *IRAQ FOR SALE: THE WAR PROFITEERS* (Brave New Films 2006). This documentary bypassed the festival circuit to ensure immediate online distribution of its urgent political content. Peter Broderick, *Welcome to the New World of Distribution*, Sept. 16, 2008, Appendix B.

the financial cushion to survive the consequences should an ISP improperly throttle or block their film. Therefore, the procedure must ensure that the Commission makes decisions, issues injunctive relief, and/or imposes sanctions with little delay.

III. CONCLUSION

The open Internet is the preeminent platform for documentary and independent film—the major vehicle for the diverse, creative, and often marginalized voices that define our democracy—and it is the Commission’s responsibility to preserve it. For documentary and independent film, the open Internet has fostered the development of new and innovative distribution and promotion models, provided improved access to rich source material, and made self-distribution and self-promotion of independent and documentary film a feasible alternative to traditional channels. In turn, the Internet has come to offer a wealth of vital, diverse, and creative independent and documentary film content the likes of which this country and the world has never seen before. We applaud the Commission’s efforts to preserve the open Internet, but we are concerned that as written, the proposed rules contain significant flaws that would undermine the Commission’s goals for this rulemaking. We therefore urge the Commission to adopt the recommendations we outline above.

IV. ABOUT THE REPLY COMMENTERS

International Documentary Association

International Documentary Association (IDA) was founded in 1982 as a nonprofit membership organization dedicated to supporting the efforts of nonfiction film and video makers throughout the United States and the world; promoting the documentary form; and expanding opportunities for the production, distribution, and exhibition of documentary. Over the past twenty-eight years IDA has served as a forum and voice for documentarians around the world. IDA currently serves over 11,000 members and community users in over fifty countries, offering programs, seminars, lectures, workshops, and screenings for those members and the general public. Among its many activities, IDA publishes a quarterly magazine, *Documentary*, devoted exclusively to nonfiction media, hosts the annual IDA Documentary Awards, and serves as a fiscal sponsor for more than 500 nonfiction projects.

Film Independent

Film Independent is a non-profit organization dedicated to helping independent filmmakers make their films, building the audience for independent film, and increasing diversity in the film industry. Every year, FIND provides its member base of roughly 4,000 with over 250 hours of film education programming, more than a hundred free preview screenings of the latest independent films, substantial production rental discounts, and fellowship and grant opportunities totaling over \$240,000.

University Film & Video Association

Founded in 1947, the UFVA is an international organization involved in film, video, and art production as well as the study of the convergence of media production with history, theory, and criticism. UFVA has over 1,000 members, which include professionals such as filmmakers,

teachers, distributors and archivists, as well as college departments, libraries, and other institutions.

Independent Filmmaker Project

The Independent Filmmaker Project (IFP) is a chapter-based national collaborative that has evolved into the nation's oldest and largest non-profit organization of independent filmmakers. IFP currently represents a network of 10,000 filmmakers worldwide and fosters the idea that independent film brings fresh ideas to the global culture, sparking awareness and activism in society. IFP educates its members in the art, technology, and business of filmmaking through workshops, conferences, seminars, and *Filmmaker* magazine, and supports the production of 350 feature and documentary films each year.

Independent Feature Project (IFP) / Chicago

IFP/Chicago is a non-profit organization committed to the idea that independent film is an important art form and a powerful voice in our society. We provide resources, information and avenues of communication for independent filmmakers, industry professionals and independent film enthusiasts. We encourage quality and diversity in independent production and assist filmmakers at all levels of experience in realizing their unique vision.

IFP Minnesota

Committed to a world where expression through images is valued and encouraged, IFP Minnesota supports and promotes the work of artists who create screenplays, film, video, and photography in the Midwest through ongoing programs and services including its Center for Media Arts program. The IFP Minnesota Center for Media Arts facilitates interaction between the creative, technical, and business aspects of filmmaking and photography. The organization does this through targeted programs that aid in the professional development of its members, support individual projects, teach both new technology and classic mediums, cultivate audiences

for independent media, and provide outreach to communities and individuals new to media making. The program boasts a network of 600 local members of photographers and filmmakers, and its re-granting programs provide \$125,000 to filmmakers and screenwriters. The IFP Minnesota Center for Media Arts continues to serve as a destination for those seeking to develop, nurture and embrace independent thinking and expression.

National Alliance for Media Arts and Culture

NAMAC is a nonprofit association whose membership comprises a diverse mix of over 350 organizations and individuals dedicated to a common goal: the support and advocacy of independent film, video, audio and online/multimedia arts. Founded in 1980, NAMAC supports and advocates for the industry by providing leadership training, capacity building programs, research and analysis, and networking opportunities. Its membership includes documentary filmmaking organizations such as Documentary Educational Resources and the Center for Independent Documentary, as well as film festivals, distributors, community-based media centers and facilities, university-based programs, and museums. Combined, these organizations serve approximately 400,000 artists and other media professionals nationwide.

APPENDIX A

Manohla Dargis, *Declaration of Indies: Just Sell it Yourself*, N.Y. TIMES, Jan. 14, 2010,
available at <http://www.nytimes.com/2010/01/17/movies/17dargis.htm>

Declaration Of Indies: Just Sell It Yourself!

LAST November inside a conference room at the University of Southern California in Los Angeles, a film consultant named Peter Broderick was doing his best to foment a revolution. Mr. Broderick, who helps filmmakers find their way into the marketplace, was spreading the word on an Internet-era approach to releasing movies that he believes empowers filmmakers without impoverishing them economically or emotionally. Mr. Broderick divides distribution into the Old World and New, infusing his PowerPoint presentation with insurgent rhetoric. He has written a "declaration of independence" for filmmakers that — as he did that afternoon — he reads while wearing a tricorn hat.

In the Old World of distribution, filmmakers hand over all the rights to their work, ceding control to companies that might soon lose interest in their new purchase for various reasons, including a weak opening weekend. ("After the first show," Mr. Broderick said, repeating an Old World maxim, "we know.") In the New World, filmmakers maintain full control over their work from beginning to end: they hold on to their rights and, as important, find people who are interested in their projects and can become patrons, even mentors. The Old World has ticket buyers. The New World has ticket buyers who are also Facebook friends. The Old World has commercials, newspapers ads and the mass audience. The New World has social media, YouTube, iTunes and niche audiences. "Newspaper ads," Mr. Broderick said, "are mostly a waste of money."

The 200 filmmakers inside the conference room laughed, soaking up Mr. Broderick's pitch as if their careers depended upon it, which perhaps they do. Independent filmmaking has never been for the faint of heart. But the consensus is

Continued on Page 16

Yourself!

From Page 1

that the past few years have been especially brutal. Sales have slowed, deal prices have dropped, and most of the major studios have retreated from the independent scene, closing or scaling back divisions like Warner Independent Pictures and Paramount Vantage, which released the kinds of movies that win critical hearts and awards. And good films are going unsold. Given the changes and downsizing, these might seem like worrisome times for movie lovers as well. After all, if these companies disappear, how do we find the next great American independent filmmaker, the new Jim Jarmusch, Wes Anderson 2.0?

For consultants like Mr. Broderick and filmmakers like Jon Reiss (the documentary "Bomb It") the answer lies in self-distribution, in filmmakers doing it themselves or, more accurately, doing it themselves with a little or a lot of help from other people, including consultants like Mr. Broderick and Richard Abramowitz. Last year Mr. Abramowitz, a film-industry veteran who runs an outfit in Armonk, N.Y., called Abramorama with one full-time employee (him), helped shepherd Sacha Gervasi's documentary "Anvil! The Story of Anvil," about a 1970s metal band and its rebirth, into a success, with almost \$700,000 at the North American box office. Consultants guide filmmakers on every angle of distribution. They can simply offer advice, but can also develop a marketing strategy, book theaters and collect the money.

If the D.I.Y. drumbeat has grown louder in recent years, it's not only because the major studios have backed away from the independent sector. That's a factor, but there are other issues involved, among them that the economic barriers to filmmaking have never been lower. Martin Scorsese once said that John Cassavetes's first feature, "Shadows," shot in the late 1950s with a 16-millimeter camera, proved to filmmakers that there were "no more excuses," adding, "If he could do it, so could we!" Still, even in the glory years of the new American cinema movement



MARISA MURGATROYD

Peter Broderick

than handing them all over to one distributor, as has been traditional. This allows filmmakers to reach audiences directly while controlling their own work and destinies, at least in theory.

The new D.I.Y. world is open-source in vibe and often execution. Participants refer to one another in conversation and on their Web sites and blogs, pushing other people's ideas and projects. (On his Web site, peterbroderick.com, Mr. Broderick even posts discount codes for other people's books.) But these new-era distribution participants are not engaging in blog-rolling. By sharing information and building on one another's ideas, they are in effect creating a virtual infrastructure. This infrastructure doesn't compete with Hollywood; this isn't about vying with products released by multinational corporations. It is instead about the creation and sustenance of a viable, artist-based alternative — one that, at this stage, looks markedly different from what has often been passed off as independent cinema over the past 20 years.

Although D.I.Y. has become shorthand for this new movement, a more complex idea of the filmmaker-audience dynamic is emerging (Mr. Reiss calls it "a sea change"), partly as a response to the shifts in the industry, though also in reaction to the changes in the audience or more specifically audiences. Although some viewers still enjoy the ritual of going out to see movies, others don't want to experience their entertainment in a theater, preferring to immerse themselves in a media-saturated world across a variety of platforms. "My son," Mr. Reiss said, speaking by phone from Los An-

from the late 1960s to the mid-1970s, when the major studios appeared more open to original voices, Cassavetes had to self-distribute his 1974 masterpiece "A Woman Under the Influence," which he did successfully, pulling in \$6 million domestically.

Inexpensive digital cameras and editing software have lowered the barrier for filmmakers even further. Yet even as the means of production have entered into more hands, companies — large and small — continue to dominate distribution. Hollywood's historical hold on resources and the terms of the conversation have made it difficult for an authentic alternative system to take root in America. The festival circuit has emerged as a de facto distribution stream for many filmmakers, yet the ad hoc world of festivals is not a substitute for real distribution. And then there's the simple fact that there are independent filmmakers who do not fit inside the Hollywood (and Hollywood-style) distribution model and do not want to. For some stubborn independents D.I.Y. distribution has at times been either the best or only option.

In 1992, the year before Disney bought Miramax Films, thereby initiating the indie gold rush, Joe Berlinger and Bruce Sinofsky became a model for true independence when they distributed their own documentary "Brother's Keeper" (1992) to substantial critical and commercial success. In the years since, those entering self-distribution have included emerging talent like Andrew Bujalski (who initially sold DVDs of his 2005 film "Mutual Appreciation" online) and established filmmakers like David Lynch (who released his 2006 movie "Inland Empire" in theaters himself). As self-distributed movies have found levels of critical or commercial success or even both, others have followed, including "The Talent Given Us," "Note by Note: The Making of Steinway L1037," "Ballast," "Helvetica" and "Good Dick."

Some self-distributed titles find their audiences with help from consultants, while others make their way into the marketplace with the help of consultants and companies that take a fee, rather than a percentage of the profits and all the distribution rights. Innovative strategies abound. Mr. Broderick is an advocate of what he calls hybrid distribution, which, as he has put it, "combines direct sales by filmmakers with distribution by third parties." Thus filmmakers hold on to their sales rights and sell the DVD retail rights to one buyer and the video-on-demand rights to another and so on — rather

geles, "consumes media on his computer and his iPod, and he will occasionally go out to a movie theater." He tries to encourage his son, who's 13, to go to the movies, but finds it tough. "He would rather interact with media on his computer than anywhere else."

One of the buzzy ideas in D.I.Y. is transmedia, a word borrowed from academia, in which stories — think of the "Star Wars" and "Matrix" franchises — unfold across different platforms. "Star Wars" helped expand the very idea of a movie, because it involved a constellation of movie-related products, from video games to action figures, all of which become part of the understanding and experience of the original, originating work. This isn't just about slapping a movie logo on a lunchbox or a screensaver: it's about creating an entertainment gestalt. As the theorist Henry Jenkins writes, "Reading across the media sustains a depth of experience that motivates more consumption." In other words, you can sell one ticket to a moviegoer or enlist fans into media feedback loops that they in turn help create and sustain.

It might seem counterintuitive that D.I.Y. independents are borrowing a page from the George Lucas playbook. But only if you forget that Mr. Lucas is the most successful independent filmmaker in history. 20th Century Fox distributed the first "Star Wars," yet Mr. Lucas kept the sequel and merchandising rights. "If I make money," he said when the movie was released, "it will be from the toys." The new generation of D.I.Y. filmmakers might not be pushing toys on their Web sites (though I'd like to see an Andrew Bujalski action figure), but they do peddle DVDs, posters, CDs, books and — much as Spike Lee did before them — are getting hip to selling themselves alongside their art.

The downside to this new D.I.Y. world is that filmmakers, who already tend to expend tremendous time and effort raising money, might end up spending more hours hawking their wares than creating new work. "I struggle with this all the time," Mr. Reiss said. But artists who want to reach an audience are rarely if ever really free of the marketplace, and filmmakers working in the commercial arena tend to be even less so. For Mr. Reiss and other do-it-yourselfers, the most important thing is to reach their audiences, any which way, niche by niche, pixel by pixel, in theaters or online. "This is the other voice of film," Mr. Reiss said with urgency, "and if this dies, all we're left with is the monopoly."

APPENDIX B

Statement of Peter Broderick and Supporting Materials

paradigm consulting

maximizing distribution, audience, and revenues

April 26, 2010

Peter Broderick's Statement for FCC Rulemaking on Net Neutrality

A free and open internet has enabled independent filmmakers to take control of the distribution of their films for the first time. This has allowed them to expand their audiences, increase their social and political impact, and maximize their revenues.

I am a leading distribution strategist for independent filmmakers. As Founder and President of Next Wave Films from 1997 until 2002, I helped exceptional filmmakers including Christopher Nolan and Amir Bar-Lev launch their careers.

Since late 2002, I have consulted with over 900 filmmakers and companies across the US and around the world. I have helped them design and implement innovative distribution strategies. Working with these filmmakers on the cutting-edge of distribution, I have developed a unique overview of the challenges and opportunities facing independents.

These experiences have enabled me to write a series of seminal articles articulating a framework for what I call the New World of Distribution. I have shared this vision through keynotes and presentations at film festivals, including Cannes, Toronto, Sundance, Amsterdam, London, Sydney, and Rio. I also publish the Distribution Bulletin, a newsletter that I send to over 5000 filmmakers and executives worldwide.

The Rise of the New World of Distribution

The Old World of Distribution is a hierarchical realm where filmmakers have to petition companies to grant them distribution. To make these deals, independents were required to give distributors total control of the marketing and distribution of their films.

The New World of Distribution has been built on the internet. In this world, independents are able to retain overall control of their distribution. Unlike in the Old World, where middlemen control access to audiences, the internet has given filmmakers unprecedented direct access to viewers. Independents can now identify, reach, and interact with viewers online. Filmmakers can sell DVDs and digital downloads directly and build ongoing relationships with viewers, enlisting them to support current and future projects by spreading the word, making donations, and contributing content.

In the Old World of Distribution, film viewers are anonymous members of a mass audience. Thanks to the internet, independent filmmakers can now know the names and email addresses of their viewers, who can become subscribers, customers, and patrons. The internet has allowed filmmakers to build and nurture core personal audiences that can sustain their careers.

Internet Success Stories

The internet has allowed a greater diversity of independent films to be made and seen. Robert Greenwald's documentary UNCOVERED, which challenged the U.S. administration's Iraq policy, made pioneering use of the internet to organize over 1,000 house parties. People gathered in living rooms across the country to watch the film and participate in a web cast with Greenwald. Launching UNCOVERED this way created widespread awareness and excitement, making it possible to sell over 150,000 DVDs online and offline.

THE SECRET, a spiritual documentary, pioneered another model of internet distribution. Viewers were attracted to the film's website by four viral trailers that got widespread play online. Visitors to THE SECRET website could pay to watch the entire film streamed at full-screen resolution. The results were remarkable—over 90% of viewers who watched the film streamed then bought the DVD. The film had already achieved tremendous financial success before it reached stores months later, demonstrating how effective an innovative internet strategy can be.

THE AGE OF STUPID, the documentary feature on global warming, demonstrated the power of the internet as a fundraising tool. By brilliantly using the web in tandem with in-person fundraising presentations, the filmmakers were able to raise over \$1.5 million in contributions to fund production, distribution, and a social action campaign. The filmmakers also made skillful use of the internet through their rich and dynamic website and an ever-expanding mailing list.

A handwritten signature in black ink that reads "Peter Broderick". The signature is fluid and cursive, with a period at the end.

Peter Broderick
President
Paradigm Consulting

DECLARATION OF INDEPENDENCE: THE TEN PRINCIPLES OF HYBRID DISTRIBUTION

We hold these truths to be self-evident, that all men are created equal, that they are endowed with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.

*That whenever any form of **distribution** becomes destructive to these ends, it is the right of the people to alter or to abolish it, and to institute new **distribution** most likely to effect their livelihood and happiness.*

*When a long train of abuses and usurpations reduce them under absolute despotism, it is their right, it is their duty, to throw off such **distribution**.*

- Thomas Jefferson (liberties taken by Peter Broderick)



Hybrid distribution is the state-of-the-art model more and more filmmakers are using to succeed. It enables them to have unprecedented access to audiences, to maintain overall control of their distribution, and to receive a significantly larger share of revenues.

This article is a sequel to my report, "[Welcome to the New World of Distribution](#)," which was

published exactly a year ago in indieWIRE. Since the report appeared, the Old World of Distribution has continued to decline. Filmmakers making Old World deals (in which they give all of their distribution rights to one company for up to 25 years) are ending up dissatisfied. Producers and directors who succeeded in the Old World are now telling me that the traditional distribution system is broken and that they are determined to find a new approach.

Meanwhile it has been a banner year in the New World. Hybrid distribution has come into its own with such successes as [VALENTINO](#) and [ANVIL! THE STORY OF ANVIL](#), both of which hired service deal companies to handle their theatrical distribution. Working with Abramorama, ANVIL has grossed over \$675,000 in U.S. theaters. Through Truly Indie and Vitagraph Films, VALENTINO grossed more than \$1,755,000 theatrically. In addition to consulting on VALENTINO, I also consulted on a number of other films that successfully combined theatrical service deals and semi-theatrical runs, including [THE SINGING REVOLUTION](#) (Abramorama), [PRAY THE DEVIL BACK TO HELL](#) (theatrical: Balcony Releasing; semi-theatrical: Film Sprout), [NOTE BY NOTE](#) (Argot Pictures), and [THROW DOWN YOUR HEART](#) (Argot Pictures).

I coined the term “hybrid distribution” in 2005 to describe the innovative model I had been developing for several years alongside a handful of pioneering independents. Inspired by the example of [REVERSAL](#) (which Jimi Petulla sold so lucratively from his website), I helped design the strategy for one of the first hybrid breakthroughs—Mark Neale’s documentary [FASTER](#). Since then I’ve worked with hundreds of filmmakers to develop and implement hybrid strategies. Each film I’ve consulted on—from features such as [BALLAST](#) and [GOOD DICK](#) to documentaries like [KING CORN](#) and [THE FUTURE OF FOOD](#)—has helped me refine the hybrid distribution model.

As this model has been used more widely, the meaning of the term “hybrid distribution” has become less precise. When Thom Powers asked me to give a presentation at the 2009 Toronto Film Festival, I took the opportunity to define the core principles of hybrid distribution. My goal was to break the concept into essential components that filmmakers can use to create customized distribution strategies. This article expands on my [Toronto presentation](#).

Let’s start with a definition. Hybrid distribution combines direct sales by filmmakers with distribution by third parties (e.g. DVD distributors, TV channels, VOD companies, educational distributors). In the Old World of Distribution, Plan A was to give all your distribution rights to one company and Plan B was self-distribution. In the New World, Plan A is doing your own direct sales while splitting up the other rights; Plan B is making an all-rights deal with one company.

Today many filmmakers are as determined to retain “distribution control” as they are to maintain “creative control.” Distribution control is the power to determine the overall structure and sequence of distribution, select distribution partners, and divide up distribution rights. While single source production financing usually means the loss of some measure of creative control, single source distribution through an all-rights deal always means the loss of distribution control.

A hybrid approach enables filmmakers to choose partners with the resources and expertise to maximize distribution in different channels while allowing filmmakers themselves to do what they do best—reach core audiences directly.

The following ten principles are distilled from the experience of filmmakers I have worked with across the country and overseas. As their distribution strategist, I have been by their side as they have explored the New World of Distribution.

1. Design a customized distribution strategy.

Every film needs a customized distribution strategy. Ideally this strategy should be designed before the film is made, increasing the chances of securing financing. To create a strategy, filmmakers must clearly define their goals and priorities, identify the film’s initial core audiences, plan different versions of the film (e.g. theatrical, television, DVD, foreign, educational), determine distribution avenues and a release sequence, identify potential partners, and decide how to initially position the film

both online and off. The strategy should be flexible, implemented one stage at a time, and regularly assessed and refined.

2. Split distribution rights.

While in the Old World of Distribution all domestic rights were usually given to one company, hybrid distribution enables rights to be split more finely and effectively. Filmmakers retain direct sales rights, including the right to sell DVDs from their websites and at screenings, and the right to sell downloads and rentals from their sites. Most often filmmakers also retain theatrical and semi-theatrical rights. VOD, television, and retail DVD deals are usually made with separate distribution partners. Deals are also made with educational partners but some filmmakers are retaining these rights. Digital rights for avenues like iTunes are more complicated—they are sometimes given to the retail DVD distributor or the VOD distributor and sometimes licensed separately.

Rights can be usefully divided into eight domestic and two international categories:

DOMESTIC	INTERNATIONAL
Theatrical	Television
Semi-Theatrical & Non-theatrical	Other (Theatrical, DVD & Digital)
VOD	
Television	
Retail DVD	
Direct DVD	
Educational	
Digital Rental & Download	

While splitting up rights is complicated and time consuming, it allows each right to be exploited well, avoids cross-collateralization (where expenses from one area of distribution eat away at revenues from others), and allows a filmmaker to retain overall distribution control.

3. Choose effective distribution partners.

In the Old World where all domestic distribution rights were usually lumped together, certain rights were often poorly utilized or completely overlooked. In the New World, it is important to determine how best to exploit every right without neglecting any of them. Filmmakers can handle some rights most successfully on their own. In other areas, the goal is to find the distribution partner with the skills and experience to be most effective. Ideally this partner has an impressive track record with similar films or particular niche audiences. Before signing any deal with a distribution partner, it is essential to speak with other filmmakers currently or recently in business with the company.

4. Circumscribe rights.

Grant each distribution partner only the specific rights they can handle well. For example, if a company is strong in retail DVD and digital, give them these rights, but do not also give them VOD if they have no experience with VOD.

Carefully limit the rights (scope, term, exclusivity) granted to each partner. Make sure the rights given to different distributors complement each other without conflicting. Make as many deals as possible at the same time so the rights given in one area do not subsequently prevent you from making deals in other areas.

5. Craft win-win deals.

Design deals that will work well for both your distribution partner and you. Divide revenues fairly and define responsibilities clearly. Build in guarantees (e.g. minimum number of cities and marketing spend, performance guarantee), approvals (e.g. of deals, marketing, editing), and safeguards (e.g. escape clauses, expense cap, bankruptcy protection, limits on assignment, dispute resolution).

6. Retain direct sales rights.

Retain the domestic and international rights to sell DVDs (from your website and at screenings) and downloads and streams (from your website). Also retain the rights to screen the film theatrically and semi-theatrically.

Direct sales are the lynchpin of a hybrid distribution strategy. They have four significant advantages over third-party sales:

- *Higher profit margins* – A DVD sold directly from a filmmaker's website can easily yield profit margins 7-8 times as high as DVDs sold in retail.
- *Faster payment* – Filmmakers usually receive payments faster from PayPal or a fulfillment company than they would from a distributor.
- *Revenues aren't split with middlemen* – Filmmakers receive all of the revenues and must only pay manufacturing and fulfillment costs.
- *Customer information* – Filmmakers receive data on all customers who make purchases from their websites, but do not get any information on consumers who buy through third-party retailers. This data enables filmmakers to stay in touch with purchasers and offer them other products.

7. Assemble a distribution team.

It is as important to have a distribution team as it is to have a production team. This team includes some or all of the following: strategist, producer's rep, foreign sales agent, webmaster, outreach coordinator, theatrical and semi-theatrical bookers, print and online publicists, and fulfillment company.

8. Partner with nonprofits and online communities.

Nonprofits can be indispensable distribution partners. They can build awareness among key core audiences by hosting screenings at national conventions and local chapters, by co-sponsoring house parties, and by promoting films through their publications and websites. Online communities can also increase buzz, audience, and sales (through affiliate marketing), potentially helping your film go viral.

9. Maximize direct revenues.

In addition to selling DVDs directly from their websites, filmmakers can also sell other products they produce (e.g. soundtrack albums, companion books, posters, hats, and t-shirts). Filmmakers can also purchase related products from third parties (e.g. books, DVDs, CDs) that will be of particular interest to their audiences. As online retailers, they can buy these products at wholesale and resell them from their sites at retail.

10. Grow and nurture audiences.

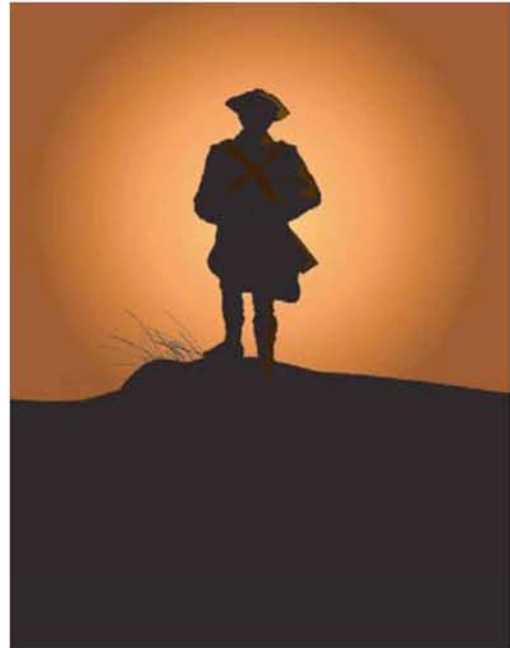
Independents can expand their films' audiences by building mailing lists, communicating effectively and developing ongoing relationships with subscribers. They should provide them with valuable and engaging content, while keeping sales pitches to a minimum. They should also create a content-rich, dynamic, and interactive website that encourages participation. Their ultimate goal is to develop a core personal audience that can support future projects through contributions and purchases.

While hybrid distribution is the state-of-the-art model for the New World, it is not the best approach for all independent films. Some movies are better served by an Old World all-rights deal with an experienced distributor. The best distributors have resources, relationships, and expertise, which can be essential to a wide theatrical release. They may also have advantageous deals in place for VOD, DVD, and digital rights. If filmmakers do due diligence (by speaking with other filmmakers involved with the distributor they are considering) and are able to negotiate a fair deal, their best choice may be an all-rights deal. Higher budget, more mainstream features are better suited for an Old World approach.

Hybrid strategies are ideal for most documentaries. Lower budget, more distinctive features, like GOOD DICK, may also be better off using a hybrid model. Features with strong core audiences can also do well splitting up their rights in the New World. MY BIG FAT GREEK WEDDING used a theatrical service deal to gross over \$241 million domestically.

Just as the development of digital filmmaking tools in the '90s meant that no one could stop determined independents from making movies, the evolution of hybrid distribution in this decade means that no one can stop tenacious filmmakers from bringing their films into the world.

As the New World of Distribution continues to expand, hybrid distribution will become the optimal model for a wider array of films. It offers three major advantages over an all-rights deal. By enabling filmmakers to retain “distribution control,” it allows them to use strategies that are much more customized and better targeted. Hybrid distribution gives filmmakers a significantly larger share of revenues through direct sales and fairer terms in third-party deals. By providing filmmakers direct access to viewers, it also lets independents develop supportive audiences around films and build personal fan bases that can help sustain them over time. Hybrid distribution can make the difference between being a dependent filmmaker in the Old World or an independent filmmaker in the New World.

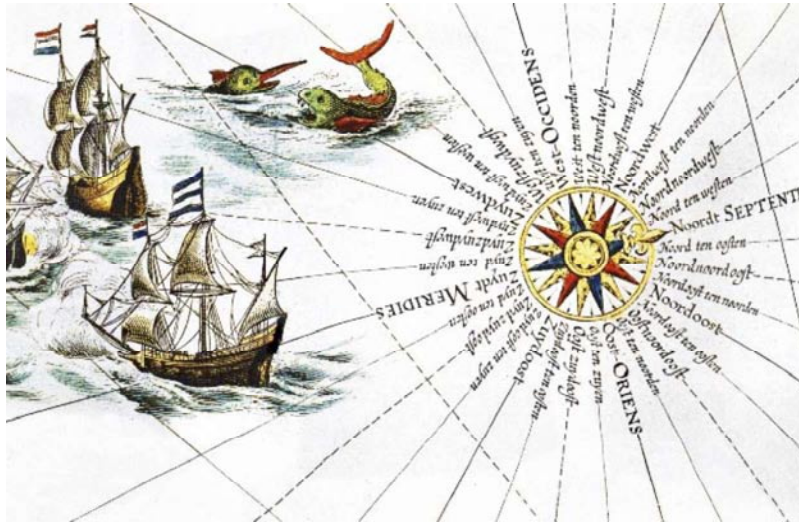


FEEDBACK WELCOME: These principles of hybrid distribution emerged from the experiences of hundreds of filmmakers. They will continue to evolve as more and more independents use these strategies. I'd welcome any thoughts, techniques, or case studies you want to send my way (peter@peterbroderick.com). My goal is to create a living document that evolves with the latest hybrid experiences and empowers filmmakers to realize their full potential. Visit www.peterbroderick.com to sign up for the DISTRIBUTION BULLETIN, featuring the latest in independent film distribution and marketing.

WELCOME TO THE NEW WORLD OF DISTRIBUTION

By Peter Broderick

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Welcome to the New World of Distribution. Many filmmakers are emigrating from the Old World, where they have little chance of succeeding. They are attracted by unprecedented opportunities and the freedom to shape their own destiny. Life in the New World requires them to work harder, be more tenacious,

and take more risks. There are daunting challenges and no guarantees of success. But this hasn't stopped more and more intrepid filmmakers from exploring uncharted territory and staking claims.

Before the discovery of the New World, the Old World of Distribution reigned supreme. It is a hierarchical realm where filmmakers must petition the powers that be to grant them distribution. Independents who are able to make all-rights deals are required to give distributors total control of the marketing and distribution of their films. The terms of these deals have gotten worse and few filmmakers end up satisfied.

All is not well for companies and filmmakers in what I call the Old World of Distribution. At Film Independent's 2008 Film Financing Conference, Mark Gill vividly described "the ways the independent film business is in trouble" in his [widely read and discussed keynote](#). Mark listed the companies and divisions that have been shut down or are teetering on the brink of bankruptcy, noted that five others are in "serious financial peril," and said that ten independent film financiers may soon "exit the business." Mark made a persuasive case that "the sky really is falling... because the accumulation of bad news is kind of awe-inspiring." While he doesn't

expect that the sky will “hit the ground everywhere,” he warned, “it will feel like we just survived a medieval plague. The carnage and the stench will be overwhelming.”

Mark’s keynote focused on the distributors, production companies, studio specialty divisions, and foreign sales companies that dominate independent film in the Old World. Mark has many years of experience in this world. He was President of Miramax Films, then head of Warner Independent, and is now CEO of the Film Department. He sees things from the perspective of a seasoned Old World executive.

I see things from the filmmaker’s perspective. For the past 11 years, I have been helping filmmakers maximize revenues, get their films seen as widely as possible, and launch or further their careers. From 1997 until 2002, I experienced the deteriorating state of the Old World of Distribution as head of IFC’s Next Wave Films. After the company closed, I discovered the New World of Distribution in its formative stages. A few directors had already gotten impressive results by splitting up their rights and selling DVDs directly from their websites.

Filmmakers started asking me to advise them on distribution, and, before I knew it, I was a “[distribution strategist](#)” working with independents across the country and around the globe. Since late 2002, I have consulted with more than 500 filmmakers. While some have taken traditional paths in the Old World, many more have blazed trails in the new one. I’ve learned from their successes and failures and had the opportunity to share these lessons with other filmmakers, who then have been able to go further down these trails. It has been very exciting to be able to participate in the building of the New World, where the old rules no longer apply.

Many of the rulers of the Old World continue to look backwards. Having spent their entire careers in this realm, played by its rules and succeeded, they can’t see past the limits of their experience. For them, the Old World is the known world, which they refer to as “the film business.” They explain away the serious problems facing the Old World by citing the film glut, higher marketing costs, mediocre films, and the historically cyclical nature of the industry. They appear to believe that everything will be just fine with enough discipline and patience—if fewer, better films are made, costs are controlled, and they can hold out until the next upturn.

Many of these executives seem unaware of the larger structural changes threatening their world. They recognize that video-on-demand and digital downloads will become more significant revenue streams but seem confident that they can incorporate them into their traditional distribution model. These executives do not understand the fundamental importance of the internet or its disruptive power. By enabling filmmakers in the New World to reach audiences directly and dramatically reducing their distribution costs, it empowers them to keep control of their “content”.

The Old World executives who do acknowledge the New World can be as dismissive as record industry executives were when they first noticed the internet. Their usual condescending response is the internet may work for “little” films with “niche” audiences. After admitting that the internet represents added competition for eyeballs, they are quick to point out that little money is currently being made from digital downloads or online advertising.

Notable successes in the New World represent the shape of things to come. Several filmmakers have each made more than one million dollars selling their films directly from their websites. Other filmmakers have begun raising money online. During 10 days of internet fundraising, [Robert Greenwald](#) attracted \$385,000 in contributions for his documentary “[Iraq for Sale](#).”

Arin Crumley and Susan Buice built awareness for their feature “[Four Eyed Monsters](#)” through a series of [video podcasts](#). They then made their film available for free on YouTube and MySpace, where it was viewed over a million times. Arin and Susan made money through shared ad revenues and Spout.com sign-ups, and then snagged a deal with IFC for domestic television and home video distribution. Wayne Wang followed in their footsteps when he premiered his new feature “The Princess of Nebraska” in [The YouTube Screening Room](#).

The power of the internet was also demonstrated by the remarkably successful documentary, “[The Secret](#).” During the first stage of its release, “The Secret” could be streamed or purchased at the film’s website, but was not available in theaters, on television, in stores, or on Amazon. During the next stage, [the book](#) was launched by Simon & Schuster in bookstores and online. After the book shot to the top of the bestseller list, “The Secret” DVD was finally made available

in retail stores and on Amazon. Over 2 million DVDs were sold during the first twelve months of its release.

The following chart illustrates the essential differences between Old and New World Distribution:

OLD WORLD DISTRIBUTION	NEW WORLD DISTRIBUTION
Distributor in Control	Filmmaker in Control
Overall Deal	Hybrid Approach
Fixed Release Plans	Flexible Release Strategies
Mass Audience	Core and Crossover Audiences
Rising Costs	Lower Costs
Viewers Reached thru Distributor	Direct Access to Viewers
Third Party Sales	Direct and Third Party Sales
Territory by Territory Distribution	Global Distribution
Cross-Collateralized Revenues	Separate Revenue Streams
Anonymous Consumers	True Fans

Here are ten guiding principles of New World distribution:

1. **GREATER CONTROL** – Filmmakers retain overall control of their distribution, choosing which rights to give distribution partners and which to retain. If filmmakers hire a service deal company or a booker to arrange a theatrical run, they control the marketing campaign, spending, and the timing of their release. In the OW (Old World), a distributor that acquires all rights has total control of distribution. Filmmakers usually have little or no influence on key marketing and distribution decisions.
2. **HYBRID DISTRIBUTION** – Filmmakers split up their rights, working with distribution partners in certain sectors and keeping the right to make direct sales. They can make separate deals for: retail home video, television, educational, nontheatrical, and VOD, as well as splitting up their digital rights. They also sell DVDs from their websites and at screenings, and may make digital downloads available directly from their sites. In the OW, filmmakers make all-rights deals, giving one company all their rights (now known or ever to be dreamed up) for as long as 25 years.
3. **CUSTOMIZED STRATEGIES** – Filmmakers design creative distribution strategies customized to their film's content and target audiences. They can begin outreach to audiences and potential organizational partners before or during production. They often ignore traditional windows, selling DVDs from their websites before they are available in stores, sometimes during their theatrical release, and even at festivals. Filmmakers are able to test their strategies step-by-step, and modify them as needed. In the OW, distribution plans are much more formulaic and rigid.
4. **CORE AUDIENCES** – Filmmakers target core audiences. Their priority is to reach them effectively, and then hopefully cross over to a wider public. They reach core audiences directly both online and offline, through websites, mailing lists, organizations, and publications. In the OW, many distributors market to a general audience, which is highly inefficient and more and more expensive.

Notable exceptions, [Fox Searchlight](#) and [Bob Berney](#), have demonstrated how effective highly targeted marketing can be. “[Napoleon Dynamite](#)” first targeted nerds, “[Passion of the Christ](#)” began with evangelicals, and “[My Big Fat Greek Wedding](#)” started with Greek Americans. Building on their original base, each of these films was then able to significantly expand and diversify their audiences.

5. **REDUCING COSTS** – Filmmakers reduce costs by using the internet and by spending less on traditional print, television, and radio advertising. While four years ago a five-city theatrical service deal cost \$250,000 - \$300,000, today comparable service deals can cost half that or even less. In the OW, marketing costs have risen dramatically.
6. **DIRECT ACCESS TO VIEWERS** – Filmmakers use the internet to reach audiences directly. The makers of the motorcycle racing documentary, “[Faster](#),” used the web to quickly and inexpensively reach motorcycle fans around the world. They pulled off an inspired stunt at the Cannes Film Festival, which generated international coverage and widespread awareness among fans. This sparked lucrative DVD sales first from the website and then in retail stores. In the OW, filmmakers only have indirect access to audiences through distributors.
7. **DIRECT SALES** – Filmmakers make much higher margins on direct sales from their websites and at screenings than they do through retail sales. They can make as much as \$21 profit on a \$24.95 website sale (plus \$4.95 for shipping and handling). A retail sale of the same DVD only nets \$2.50 via a typical 20% royalty video deal. If filmmakers sell an educational copy from their websites to a college or university for \$250 (an average educational price), they can net \$225. Direct sales to consumers provide valuable customer data, which enables filmmakers to make future sales to these buyers. They can sell other versions of a film, the soundtrack, books, posters, and t-shirts. In the OW, filmmakers are not permitted to make direct sales, have no access to customer data, and have no merchandising rights.
8. **GLOBAL DISTRIBUTION** – Filmmakers are now making their films available to viewers anywhere in the world. Supplementing their deals with distributors in other

countries, they sell their films to consumers in unsold territories via DVD or digital download directly from their websites. For the first time, filmmakers are aggregating audiences across national boundaries. In the OW, distribution is territory by territory, and most independent films have little or no foreign distribution.

9. SEPARATE REVENUE STREAMS – Filmmakers limit cross-collateralization and accounting problems by splitting up their distribution rights. All revenues from sales on their websites come directly to them or through the fulfillment company they've hired to store and ship DVDs. By separating the revenues from each distribution partner, filmmakers prevent expenses from one distribution channel being charged against revenues from another. This makes accounting simpler and more transparent. In an OW all-rights deal, all revenues and all expenses are combined, making monitoring revenues much more difficult.

10. TRUE FANS – Filmmakers connect with viewers online and at screenings, establish direct relationships with them, and build core personal audiences. They ask for their support, making it clear that DVD purchases from the website will help them break even and make more movies. Every filmmaker with a website has the chance to turn visitors into subscribers, subscribers into purchasers, and purchasers into true fans who can contribute to new productions. In the OW, filmmakers do not have direct access to viewers.

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While almost everyone seems to have an opinion about the state of the Old World of Distribution, the New World is much harder to assess. Although its population is growing rapidly and there are a number of boomtowns, much of it remains unexplored. There are no maps or guidebooks. Fortunately I have accompanied hundreds of filmmakers on their journeys, and many others have sent me reports from the frontiers. Here is an overview of what many independents have discovered so far about the geography of the New World:

FILM FESTIVALS are more important for most films. Because it has gotten harder to achieve theatrical distribution, filmmakers likely to get little or no exposure in theaters must make the most of festivals to start building press and public awareness. Festivals continue to play an

important role in attracting distributors. But in the New World it is more likely that rights will be split among several distributors in deals signed months after the festival premiere than through an all-rights deal made at 3 AM in a condo at Sundance.

Filmmakers have begun selling DVDs at festival screenings. The documentary feature “[Lumo](#)” sold 80 DVDs at a single festival screening. Since today there are a greater number and diversity of festivals and markets than ever before, filmmakers are developing customized festival strategies, and then continually refining them as they receive invitations and start playing festivals.

In the NW (New World), a notable minority of films are skipping festivals entirely, having determined they aren’t worth the substantial investment of money, time, and effort. This includes films that have avid core audiences and don’t need festivals (e.g. “The Secret”), films that have urgent political content and can’t wait for festivals (e.g. Robert Greenwald’s “Iraq for Sale”), and films that have immediate commercial opportunities which could be lost during months spent on the festival circuit.

THEATRICAL DISTRIBUTION in the NW is under the filmmaker’s control. Many filmmakers work with a booker or service deal company, enabling them to fully control their theatrical launch while retaining all their distribution rights. To secure a theatrical release in the OW (Old World), filmmakers must give a single company all their US (or North American) distribution rights and total control of their film’s marketing and distribution. Some filmmakers want theatrical distribution so badly that they agree to all-rights deals even though there is no advance and no chance of receiving a financial return.

The current state of theatrical distribution is dismal for most independent features and documentaries. Theaters are overcrowded with studio films and higher-budget independents (including many mediocre equity-financed movies). When twenty-one new pictures open on a Friday in NY and LA, what chance do films with limited advertising budgets have?

In the NW, many filmmakers view a theatrical release as desirable but not essential. They make pragmatic assessments of the value of a theatrical run and whether they have (or can find) the

resources to do one cost-effectively. Rather than hoping for wide release in hundreds of cities, they explore very limited theatrical releases in one to six markets (via regular bookings and/or four-wall arrangements in which they rent theaters and keep all ticket sales). Filmmakers determine whether the possible benefits (reviews, awareness, Academy Award eligibility, career opportunities, etc.) outweigh the costs. If they decide on a theatrical release, they need to be as diligent about managing their expectations as controlling costs. While they can hope that their initial theatrical engagements will go well enough to allow them to go wider, they must be prepared for minimal ticket sales and no expansion to other cities. Some filmmakers decide theatrical isn't worth it and premier on television or video.

NONTHEATRICAL DISTRIBUTION can generate significant revenues for NW filmmakers. While the costs of theatrical distribution are almost always greater than the revenues, filmmakers can make money from every booking on a campus or at a museum. For each screening, an initial rental fee is paid as an advance on 35-50% of ticket sales. If filmmakers attend, they also receive a speaker's fee, usually at least \$750 plus expenses. Filmmakers also sell DVDs at these screenings. At \$20 per DVD, these sales can add up quickly. Some filmmakers work through nontheatrical distributors, splitting rental fees 50/50. Others do it themselves. Benefiting from all the publicity they generated during their theatrical release, the "[King Corn](#)" filmmakers organized 150 community screenings across the country.

HOME VIDEO DISTRIBUTION is the biggest source of revenue for most filmmakers in the NW. Choosing the right retail video distributor, structuring a fair deal, and maximizing direct sales from the filmmaker's website are all critically important. In the OW, filmmakers who make all-rights deals do not get to select their video distributor or structure the video deal. They are often discouraged or prohibited from selling DVDs directly. Some OW distributors believe that they are operating in a zero sum framework in which they will lose a DVD sale every time a filmmaker makes one. In the NW, most video distributors allow filmmakers to sell directly from their websites. Retail sales have often increased when filmmakers have actively promoted and sold their films online.

NW filmmakers use hybrid video distribution strategies to make the most of retail and direct sales. They often first make a limited edition DVD (just the film, no extras) available exclusively

from their website and at screenings. During this window, before their film is in stores or on Amazon, filmmakers can maintain their price point (since no retailers are discounting it), receive 100% of revenues within a few days of a buyer ordering it online with a credit card, and acquire the email address of every customer. After this initial window of 3 or 4 months, their home video distributor makes a retail edition of the film (enhanced with extras) available to stores, Netflix, and Amazon. The filmmaker simultaneously sells this edition from the website and at screenings. NW filmmakers often receive a greater percentage of retail video revenues through 50/50 deals or distribution fee deals than OW filmmakers make through standard royalty deals.

EDUCATIONAL DISTRIBUTION can also garner significant revenues for NW filmmakers, but the choices are more complicated than they used to be. In the OW, filmmakers who controlled their own rights often had to choose between making a deal with a home video distributor or making one with an educational distributor who would sell copies to colleges, universities, libraries, and organizations. If filmmakers made an educational deal, they usually had to agree to postpone the home video release of their film, sometimes for as long as five years. Educational distributors were afraid that once a consumer DVD was available for \$25, they would no longer be able to sell their educational version for \$250.

In the NW, home video rights are more valuable, so many educational distributors are learning to coexist with home video. They have shortened the window they require of exclusive educational availability and are allowing filmmakers to sell from their websites. Some filmmakers have opted to do their own educational distribution, hiring someone part-time to handle it, buying mailing lists, sending emails or postcards to educators, selling directly through their websites, and using their own fulfillment company. It is much more work and is likely to produce fewer sales than an educational distributor can, but some filmmakers would rather keep all revenues after their costs than receive a 30% royalty. Filmmakers who believe they can make more money doing it themselves should consider whether the time required could be better spent on other aspects of their distribution, such as outreach to organizations.

TELEVISION can be an important source of direct and indirect revenues. Domestic television licensing fees range from hundreds of thousands of dollars down to thousands of dollars. For films that have had little or no theatrical distribution, a national television airing may make it

easier to make a retail video deal and sell DVDs. Some filmmakers let PBS air their film for no fee if they are allowed to sell spots at the head and tail of the broadcast to underwriters for sums that could total their entire budget. To maximize television sales overseas, filmmakers need a good foreign sales agent and, if it is a documentary, a version of their film that will fit a one-hour slot.

The innovative [IFC First Take](#) program demonstrates the growing importance of video on demand (VOD), which enables consumers to virtually rent individual movies for limited viewing periods. Collapsing traditional release windows, IFC First Take simultaneously launches films in theaters and on VOD through Comcast and other cable and satellite operators. The program was so successful that, this year, IFC started [Festival Direct](#), which, skipping theaters altogether, premieres films on VOD.

DIGITAL RIGHTS are the most complicated and contentious rights in the NW. Unlike in the past when rights were clearly separated, today they often overlap. Everyone seems to want some of your digital rights. The digital rights home video distributors want may conflict with the digital rights required in the TV deal which may conflict with the rights needed by Netflix for [Watch Now](#). Few companies are now making much money from digital downloads, but most are hoping they soon will. The notable exception is iTunes, which is best approached through one of its designated content aggregators. Filmmakers must carefully structure any deals that include digital rights so that they are complementary rather than in conflict.

Digital distribution is in its formative stages. While it is impossible to predict its future, it is clear that digital rights will become more valuable. For now, many savvy filmmakers are holding onto as many of their digital rights as possible, including the right to do digital downloads directly from their own websites. They are avoiding long non-exclusive deals. They also recognize that in many cases it isn't be possible to separate digital rights from analog rights, and that many deals will require a mix of both.

INTERNATIONAL DISTRIBUTION in the NW is still driven by television sales.

Independents taking a hybrid approach are working with foreign sales agents to sell their rights territory-by-territory, while retaining the right to sell directly into countries where they don't

have video distribution. Many filmmakers are making their films available to consumers around the world through DVD sales and digital downloads from their websites. In the OW, many filmmakers can't find a foreign sales agent and have no foreign distribution.

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If you're ready to venture into the New World, here's the best advice from the explorers and trailblazers that have gone before you:

Be strategic – In the Old World, most filmmakers have reactions not

strategies. They choose the best offer from those they receive. It is essential to be proactive in the New World. You need a strategy to navigate it successfully.

Think long term – Be clear about your goals. Are you creating a business around a group of films with common content? Are you building a career as an artist with a core personal audience?

Stay flexible – Implement your strategy stage by stage and modify it as you go. You learn valuable information in every stage that will enable you to improve your plan for the next stage.

Split rights – Retain overall control of your distribution. Take a hybrid approach, dividing certain rights among distributors and retaining the right to do direct sales.

Target audiences – Research, test, and refine your approach to core audiences. Understand who is most responsive to your films, and how to reach them most effectively.

Find partners – Look for national nonprofits, websites, sponsors, and distributors to team up with to bring your film to their members, subscribers, and customers.

Build a team – Find teammates who can help with the website, outreach, fulfillment, theatrical, domestic sales, and foreign sales.

Harness the internet – Use your website to build awareness, develop a mailing list, attract user-contributed content, and make direct sales. Design a compelling site that will have a life of its own.

Be creative – Avoid formulaic distribution ruts. Apply the same creativity to distribution as production. It is often harder to bring a movie into the world than to produce it. An innovative approach to distribution can make all the difference.

Make distribution happen – Design a distribution strategy and find the distributors, partners, and teammates to help you implement it.

Life in the New World isn't easy. Determination, persistence, and grit are required. There are no magical solutions and success is not assured. But for all the obstacles and dangers, there are unparalleled opportunities. Free at last to reach audiences directly, independent filmmakers can now take control of their distribution and reap the rewards.

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